80-848

Supreme Court, U. S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PIPER AIRCRAFT COMPANY, *Petitioner,*

v.

GAYNELL REYNO, *et al., Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation.[1]

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[1] Parties to the proceeding in the United States Court of Appeals for the Third Circuit were: Gaynell Reyno, as personal representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott; Piper Aircraft Corporation; and Hartzell Propeller, Inc. Petitioner Piper Aircraft Corporation is a subsidiary of Bangor Punta Corporation. Piper Aircraft Corporation has no subsidiaries or affiliates.

Hartzell Propellor, Inc. is only nominally a Respondent to this Petition and is filing its own Petition for a writ of *certiorari* to review the judgment below.

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OPINION BELOW

The opinion of the Court of Appeals (App. A *infra*, pp. 1a-38a) is not yet reported. The opinion of the District Court (App. C *infra* pp. 1c-21c) is reported at 479 F.Supp. 727 (D.C. Pa. 1979).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 24, 1980 (App D *infra* p. 4a), and amended by order dated September 15, 1980. (App. B *infra* pp. 1b-2b). A timely petition for rehearing *en banc* was denied on August 27, 1980 (Appendix E *infra* p. 1e). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This suit is a foreign-soil aircraft accident action arising out of a commercial flight between points in Great Britain and Scotland which crashed on July 27, 1976 in mountainous terrain near Talla, Scotland. All six persons aboard the aircraft were killed. The decedents, as well as their heirs and next of kin, were Scottish citizens and residents. The aircraft involved, a Piper Aztec, was piloted by a Scottish citizen and resident acting in the course of his employment with a Scottish air taxi service, McDonald Aviation Limited, which leased and operated the aircraft at the time of the accident. The aircraft was registered in Great Britain and was owned and maintained by another Scottish concern, Air Navigation Ltd.

On July 21, 1977, Gaynell Reyno, a California resident, brought this suit on behalf of five of the six Scottish decedents, William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, in the California Superior Court against Petitioner, Hartzell Propeller, Inc. ("Hartzell") and Avco Lycoming.[1] Respondent Reyno is not

[1] Avco Lycoming was dismissed with the consent of the Respondent on November 29, 1977 by order of the United States District Court for the Central District of California.

related to the decedents or their heirs and next of kin, the real parties in interest and, as such, would not be entitled to represent the decedents under Scottish law. The complaint asserts a wrongful death cause of action based on American law, as the law of Scotland does not recognize such a cause of action, based on American products liability theories, also not recognized under Scottish law, and on negligence claims, which are recognized in Scotland. Petitioner and Hartzell denied liability, contending, *inter alia*, that the accident was the result of pilot error and/or improper maintenance and repairs by McDonald Aviation Limited and Air Navigation Ltd., Scottish third parties who are beyond the jurisdiction of the American courts. The action was removed to federal court on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a) pursuant to 28 U.S.C. § 1441. On November 23, 1977, Petitioner moved to transfer the action to Pennsylvania, which motion was granted over Respondent's strenuous objections as to the convenience and fairness of the Middle District of Pennsylvania. Upon further consideration of the case, particularly facts which were discovered only after the transfer of the action to Pennsylvania, Petitioner and Hartzell moved to dismiss or for judgment on the pleadings on the grounds of *forum non conveniens* in May, 1978. Petitioner's motion was supported by a list of the witnesses which it would call. (App. F *infra* 1f-3f).

After careful consideration of the case, and the affidavits submitted by the parties, the District Court dismissed the action on the grounds of *forum non conveniens*, on the basis of the public and private interests identified by this Court in *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947). (App. C. *infra* pp. 1c-21c). The dismissal was conditioned on the stipulation of the

defendants below that they would agree to their joinder as defendants in a Scottish suit brought on behalf of the Plaintiff's beneficiaries and to waive any statute of limitations defense arising after the date of the institution of the instant action.

In terms of the private interests of the parties, the District Court relied heavily on the fact that the suit was brought on behalf of Scottish nationals, not American citizens, in a forum which was not their home forum. Since the real parties in interest were not American citizens and had not chosen their home jurisdiction, the District Court afforded their choice of an American forum less weight than an American plaintiff's preference to sue in his own home jurisdiction.

Another factor found to counsel strongly in favor of dismissal by the District Court was the fact that virtually all of the contacts with the suit were in Scotland. These contacts included the fact that the suit arose out of the death of Scottish citizens, that the accident occurred in Scotland, that the aircraft was operated and maintained by a Scottish company and owned by another Scottish company, that the pilot of the fatal flight was Scottish, that the aircraft had been registered, serviced and maintained in Great Britain for at least seven years before the accident, that the decedents' estates would be administered in Scotland and that any economic loss to the real parties in interest occurred in Scotland and any monetary recovery would be spent in Scotland for their benefit. In contrast, the only contact the United States had with the controversy was the manufacture of the aircraft and propeller in Pennsylvania and Ohio, respectively, more than ten years ago.

The Court reasoned further that all of the evidence of damages lay in Scotland, and virtually all of the

evidence relating to Petitioner's and Hartzell's defenses, as well as Respondent's claims, was located in Scotland. These Scottish witnesses and documents would not only be difficult and costly to transport to the United States, but also would be beyond the compulsory process of American courts if voluntary cooperation was refused. Further, the British Department of Trade Investigation had conducted an extensive investigation into the accident, including three weeks of adversary hearings in Edinburgh, Scotland, at which hearings the decendents' heirs and next of kin and the defendants in this action were represented by counsel, and the remains of the wreckage are in the custody and possession of the British Department of Trade. The presence of virtually all of the evidence of both liability and damages in Scotland and the absence of compulsory process to obtain the Scottish witnesses and documents for a trial in the United States, as well as Scotland's substantial investment of time and effort in the case, was another private interest factor the District Court determined weighed heavily in favor of dismissal.

The District Court also relied on the fact that this accident was the subject of two other, duplicative suits in the foreign jurisdiction and that there were necessary third party defendants who could not be joined in this suit but who could be joined in Scotland, and were even parties to the pending foreign actions, as factors strongly favoring dismissal of the American suit in favor of consolidation of the litigation in Scotland. A second action was filed in Great Britain in July, 1978 against Piper Aircraft Corporation, Hartzell Propeller, Inc., Air Navigation and Trading Company, Ltd. and McDonald Aviation, Limited by the representatives of the pilot, the one person aboard the aircraft who is not represented in this action. In addition, the Scottish heirs and next of kin of the Scottish decedents on whose behalf this action

is brought have brought a civil action in their home forum, Scotland, against the two Scottish companies involved, Air Navigation and Training, Ltd. and McDonald Aviation Limited. These are the necessary third party defendants who Petitioner and Hartzell claim may be responsible for the accident but cannot be joined in this action.

In terms of the public interest, the District Court, after determining that Scottish and Pennsylvania law would govern different issues in the case, was concerned with the confusion that would arise from the application of different substantive law to the different parties in the same case and the burden on the local courts and communities of trying a Scottish aircraft case in which they had little interest. The Court rejected the Respondent's claim that the possibility that Scottish courts would apply Scottish law to the Scottish beneficiaries' claims, which law was less favorable to the Scottish beneficiaries' chances of recovery, if the suit was dismissed, precluded a *forum non conveniens* dismissal, noting:

> That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum. (App. C *infra* p. 20c).

The Court of Appeals for the Third Circuit reversed the District Court and remanded the case for trial. The Court below held that the District Court erred in considering the nationality of the real parties in interest and by applying a less stringent burden of proof in a suit brought on behalf of foreign nationals than that which applies to a suit brought by American citizens, determining that the nationality of the plaintiff or the real parties in interest was irrelevant to the merits of a *forum non conveniens* dismissal. With respect to the balance of the public and private interests, the Court eschewed reliance on the established factors in favor of a new factor held to be determinative of a *forum non conveniens* motion and, as a result, concluded that the District Court had erred in its balance of the interests. Although the Court below noted the factors set forth in *Gulf Oil Corporation* v. *Gilbert, supra*, the Court gave little, if any, weight to the traditional *forum non conveniens* factors, relying instead on the effect of a *forum non conveniens* dismissal on the plaintiff's chances of recovery. Having determined that under the applicable choice of law rules,[2] American law would be applicable to the plaintiff's claims if these claims were tried in American courts and that American law was more favorable to the plaintiff's chances of recovery than Scottish law, the law of the decedents' home forum, because Pennsylvania law

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[2] A federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Where, as here an action has been transferred pursuant to 28 U.S.C. § 1404(a), the transferee court must apply the law of the state of the transferor forum. *Van Dusen v. Barrack*, 376 U.S. 613 (1964). In the instant case, this rule led to the application of California choice of law rules to plaintiff's claims against Piper and Pennsylvania rules to those against Hartzell. The Circuit Court determined that under both rules, American, not Scottish, law would apply to the case.

recognizes products liability theories and wrongful death causes of action not recognized under Scottish law, the Court concluded:

> But this Court has held that a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law."[1] Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified. (App. A, *infra* pp. 22a-22b).

REASONS FOR GRANTING THE WRIT

The Third Circuit Court of Appeals held that a foreign citizen has an absolute right to maintain a suit in a federal district court, essentially without regard to whether the foreign citizen's home jurisdiction is the more fair or convenient forum, whenever American law is more favorable or generous to the foreign plaintiff than is the law of his own jurisdiction. This novel conclusion squarely conflicts with this Court's decision in *Canada Malting Co., Ltd.* v. *Paterson Steamships*, 285 U.S. 413 (1932), a decision which has been explicitly followed by the Second Circuit in *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448 (2nd Cir. 1975), *cert. denied* 423 U.S. 1052 (1976). The decision below also conflicts in principle with the standards established by this Court and by

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[1] The Circuit Court was quoting a prior decision, *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3rd Cir. 1977), *cert. denied*, 535 U.S. 904 (1978). In *DeMateos*, a *forum non conveniens* dismissal was affirmed only after the Third Circuit determined that a dismissal would not impair the foreign plaintiff's chances of recovery because under the choice of law rules of the forum state, foreign law would apply to the foreign plaintiff's claims.

the other Courts of Appeals for the application of the doctrine of *forum non conveniens*.

The issue posed by this case bears significantly on the power of federal courts to decline to exercise jurisdiction over foreign controversies, the litigation of which belongs in a foreign forum. This Court should grant review in order to resolve the conflict created by the decision below and to determine whether federal courts must leave their doors permanently open to forum shopping by foreign plaintiffs.

1. The decision of the Court below directly conflicts with this Court's decision in *Canada Malting Co., Ltd.* v. *Paterson Steamships, supra*. In *Canada Malting* the libellant had contended that the action could not be dismissed for *forum non conveniens* because a dismissal would work a change in the law governing the case from American law to Canadian law, which law was the law of the libellant's home forum and was less favorable to its chances of recovery. The respondent argued that dismissal was not precluded because foreign law would apply to the libellant's claims even if the suit were tried in American courts. This Court affirmed the dismissal without resolving the question of what law would govern the case and hence, without resolving whether a dismissal would result in a change in the applicable substantive law, thereby sanctioning the granting of *forum non conveniens* dismissals irrespective of the effect of a dismissal on the law applicable to the case or the plaintiff's chances of recovery and affirming the propriety of a *forum non conveniens* dismissal despite such claims as to an adverse effect on the plaintiff's chances of recovery. The Court stated, "[w]e have no occasion to inquire by what law the rights of the parties are governed as we are of the opinion that, under any view of that question, it

lay within the discretion of the District Court to decline to assume jurisdiction over the controversy." 285 U.S. at 419-420.

The decision of the Court below is also in direct conflict with the decision of the Second Circuit Court of Appeals[4] in *Fitzgerald* v. *Texaco, Inc., supra,* which also involved a suit on behalf of foreign nationals against an American corporation. There, as here, the plaintiff had claimed that a suit could not be dismissed under the *forum non conveniens* doctrine if the law of the alternate, foreign forum is less favorable to the plaintiff's chances of recovery. The Second Circuit rejected this argument, stating:

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum may be less favorable to the Plaintiff's chance of recovery. *Canada Malting Co., Ltd.* v. *Paterson Steamships*, 285 U.S. 413, 418-20, 52 S. Ct. 413, 76 L.Ed. 837 (1932). A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in forum, especially a foreign one, where he is less likely to recover. *Id.* at 453.[5]

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[4] The *forum non conveniens* cases now appear to be concentrated in the Second and Third Circuits. See *Alcoa Steamships Co., Inc.* v. *M/V Nordic Regent,* No. 78-7054 (2nd Cir., February 25, 1980). Unfortunately, the two circuits have adopted very different, inconsistent approaches to the *forum non conveniens* doctrine. The Third Circuit has adopted a liberal approach to the exercise of federal diversity jurisdiction over foreign controversies, while the Second Circuit has been more restrained in the exercise of its jurisdiction in such cases, granting *forum non conveniens* dismissals more liberally. *Alcoa Steamships Co., Inc.* v. *M/V Nordic Regent, supra.*

[5] At least one district court in the Ninth Circuit has also held that the effect of a *forum non conveniens* dismissal on a foreign plaintiff's chances of recovery is irrelevant to the merits of the dismissal. *Michell* v. *General Motors Corporation,* 439 F. Supp. 24 (N.D. Ohio 1977).

The decision of the Court below that the district court never has any discretion to dismiss a suit for *forum non conveniens* when the law of the alternate, foreign forum is less favorable to the plaintiff squarely conflicts with this decision of the Second Circuit. This Court has criticized the insistence on the application of American law, particularly to foreign claims or foreign plaintiffs, as an unnecessarily parochial, ethnocentric approach. In *M/S Bremen* v. *Zapata Off-Shore Company*, 407 U.S. 1 (1972), the Court stated, relative to the enforceability of forum selection clauses calling for the trial of a case in a foreign forum, that "we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." 407 U.S. at 9. The Court also rejected the argument that the forum clause was contrary to American public policy because the designated forum, England, would enforce an exculpatory clause, which American courts would not enforce for public policy reasons. 407 U.S. at 15-16. Thus, the Third Circuit's decision in this case also conflicts in principle with this decision of the Court that the applicable substantive law and the plaintiff's chances of recovery are not appropriate considerations in determining the proper venue for the trial of foreign controversies.

Moreover, by showing a special solicitude for foreign plaintiffs seeking to exploit the differences between American law and the law of their own country, the Court below significantly departed from the direction pointed by the decisions of this Court in cases involving the doctrine of *forum non conveniens*. This Court has held that a foreign plaintiff's choice of an American forum is not entitled to the same weight as an American plaintiff's choice of an American forum, and is certainly

not entitled to any significant weight. In both *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) and *Canada Malting Co., Ltd.*. v. *Paterson Steamships, supra*, the Court distinguished suits brought on behalf of foreign nationals from suits by American citizens in balancing the *forum non conveniens* factors, requiring a much stronger balance of the public and private interests in favor of the dismissal if the suit was brought on behalf of an American plaintiff who would be forced to sue in a foreign country if the American suit were dismissed than in a suit brought on behalf of foreign nationals. In *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, supra*, an admiralty action brought by an American company against a foreign concern, the Court held that the application of the *forum non conveniens* doctrine to a suit by an American plaintiff brings into consideration different factors than those in suits between foreign nationals, stressing the significance of the fact that the plaintiff had chosen its home jurisdiction as the forum for the suit. 339 U.S. at 697.

The refusal of the Court below to afford less weight to the Scottish heirs' and next of kins' selection of a forum foreign to them is also inconsistent with the Court's reasoning in *Koster* v. *Lumbermens Mutual Casualty Company*, 330 U.S. 518 (1947). In *Koster*, the Court reviewed the rationale for deferring to a plaintiff's choice of forum, and declined to give the plaintiff's choice such deference where these reasons were not present. As in *Koster*, the reasons for affording the plaintiff's choice of forum deference, such as the convenience and related benefits to the plaintiff from a suit in his home forum, are not present here, such that the plaintiff's choice of forum should have been given little, if any, weight by the Court below.

The decision of the Court below relative to the significance of the citizenship of the real parties in interest is also in direct conflict with the decisions of the Second and Ninth Circuits applying the *forum non conveniens* doctrine. The Second Circuit has distinguished suits brought by Americans in American courts where the application of this doctrine would relegate an American to a foreign court from suits brought by a foreign plaintiff where declining to exercise jurisdiction would remit the foreign plaintiffs to their remedies in their own courts. The Second Circuit has held that the balance of factors must be much stronger in the former cases than in the latter. *Olympic Corporation* v. *Societe Generale*, 462 F.2d 376, 378 (2nd Cir. 1972); *see Farmanfarmaian* v. *Gulf Oil Corporation*, 588 F.2d 880, 882 (2nd Cir. 1978).[6]

In *Paper Operations Consultants International Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975), the Ninth Circuit Court of Appeals stressed that one of the "foremost factors" in favor of the refusal to exercise

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[6] The Second Circuit has permitted one exception, which applies where there is a treaty between this country and the foreign plaintiffs' country guaranteeing the foreign plaintiff access to American courts on terms no less favorable than those afforded American citizens. Where such a treaty is brought to the court's attention, the Second Circuit affords the foreign plaintiff's choice of an American forum the same weight given an American's choice. *Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent, supra*; *Farmanfarmaian* v. *Gulf Oil Corp., supra*. No such treaty is involved in the instant case. The Court below was aware of the Second Circuit's rule, but attempted to circumvent the conflict with a footnote stating that *Olympic Corp.* v. *Societe Generale, supra*, had apparently been overruled *sub silento* by *Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent, supra*. This is not an accurate explanation of *Alcoa Steamships Co., Inc.* v. *M/V Nordic Regent, supra*, as the Court there and in *Farmanfarmaian* v. *Gulf Oil Corporation, supra*, clearly affirmed the rule of *Olympic*, only limiting its applicability in cases where it would conflict with this country's treaty obligations.

the court's jurisdiction therein was the fact that the parties were foreign nationals. *Id.* at 672.

The Court below has created a new, preclusive test for the application of the doctrine of *forum non conveniens*, a test that has no sanction in this Court's prior decisions. The plaintiff's chances of recovery was not one of the factors identified by the Court in its seminal decision of *Gulf Oil Corporation* v. *Gilbert*, *supra*, wherein the Court first outlined the public and private interest factors to be considered in resolving a *forum non conveniens* motion in a diversity action, or in any of the other decisions by the Court relating to *forum non conveniens*. In *Gulf Oil Corporation* v. *Gilbert*, *supra*, the Court was afforded the opportunity to identify the benefits to the plaintiff's chances of recovery in the present forum as a relevant factor, as the plaintiff there admitted that he had selected the original forum because he thought he would receive a more liberal jury verdict there, *id.* at 510, but the Court did not view this as precluding dismissal and affirmed the *forum non conveniens* dismissal. More significantly, by relying solely on the applicable substantive law to deny a *forum non conveniens* dismissal, the Third Circuit has drastically revised the governing *forum non conveniens* standard to one which ignores the public and private interests enunciated by the Court in *Gulf Oil Corporation* v. *Gilbert*, *supra*, reducing the *forum non conveniens* standard to one factor, the law which will govern the suit. This is a very different standard from that recognized by this Court.[7]

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[7] The decision of the Court below is inconsistent with the decisions of other Circuit Courts in a related respect, *i.e.*, by discounting the significance of the absence of third party defendants who are beyond the jurisdiction of American courts, but subject to process in the foreign national's home jurisdiction, and the pendency

2. The decision of the Court below raises important and recurrent questions relative to the exercise of jurisdiction by the federal courts. The case raises important questions as to the propriety of federal court enforcement of a parochial, ethnocentric view that the supposed benefits of American law must be afforded to and imposed on the world community, to the encouragement, even reward, of wholesale forum shopping by foreign plaintiffs with the consequent burden on United States courts and domiciliaries from the increase in litigation which belongs, and is even pending, in other courts. Serious concerns are also posed relative to the assessment of liability against American citizens in favor of foreign domiciliaries in excess of the recovery their own home jurisdiction would provide to the detriment of American manufacturers. Indeed, the future, if any, of the *forum non conveniens* doctrine is in question as a result of the decision below.

The fundamental, and only, mechanism for controlling the exercise of federal jurisdiction over foreign cases is the *forum non conveniens* doctrine. The decision

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of another action by the foreign decedents' heirs and next of kin in the foreign forum against these absent third parties. The Court below noted that these considerations were factors in the *forum non conveniens* balance, but gave them virtually no weight, in part due to the Court's erroneous understanding of *res judicata* principles. (App. A *infra* pp 19a-20a). In contrast to this summary disregard of the significance of the prejudice and burden of the inability to implead third parties and of duplicative law suits, the First, Second, Eighth, and Ninth Circuits have given those factors substantial weight, as did the District Court in this suit. *E.g.*, *J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Limited*, 462 F.2d 998 (8th Cir. 1972); *Fitzgerald* v. *Texaco, Inc.*, *supra*; *Fitzgerald* v. *Westland Marine Corp.*, 369 F.2d 499 (2nd Cir. 1966); *Olympic Corp.* v. *Societe Generale*, *supra*; *Codex Corp.* v. *Milgo Electronic Corp.*, 553 F.2d 735 (1st Cir. 1977); *The Kanto Maru*, 112 F.2d 564 (9th Cir. 1940).

below emasculates the *forum non conveniens* doctrine, replacing the long-recognized public and private interest factors of *Gulf Oil Corporation* v. *Gilbert*, *supra*, with one consideration, the effect on the plaintiff's chances of recovery if the suit is dismissed. If, as the Third Circuit held, the suit cannot be dismissed if dismissal would impair the plaintiff's chances of recovery, then the convenience of and prejudice to the defendants and third parties and the interests of the local courts and communities, the *raison d'être* of the *forum non conveniens* doctrine, *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, *supra*; *Gulf Oil Corporation* v. *Gilbert*, *supra*, are of secondary, if any, significance. As a result, the very policies and concerns this Court sought to implement by its recognition of the *forum non conveniens* doctrine in federal diversity actions will no longer be secured by this doctrine, policies and concerns which are still quite viable in the 1980's.

As a result of the Third Circuit's elevation of the applicable law to a dispositive role in *forum non conveniens* motions, it has become generally recognized that the outcome of a case will now turn on the applicable choice of law rules. This is not the intended, or even imagined, result of the various state's choice of law rules, and these principles should not be forced into service for a purpose they were not designed to fulfill. Perhaps more significantly, this was not the basis for the application of the *forum non conveniens* doctrine intended by this Court. The decision of the Court below must be reviewed and reversed to return the *forum non conveniens* doctrine to its original foundations and the litigation of foreign accident cases to the appropriate forum.

Because the choice of law rules of the original forum state will have such a substantial impact on the

outcome of any *forum non conveniens* motions filed in the case, the plaintiff's counsel can pre-determine the resolution of such a motion by careful forum selection. An astute plaintiff's attorney can select an original forum with choice of law rules which will lead to the applicability of American law to the plaintiff's claims on the facts of the particular case, thereby guaranteeing the outcome of any *forum non conveniens* motion in the case. Federal jurisdiction should turn on more weighty considerations than the plaintiff's forum shopping skills. Indeed, if the Third Circuit's decision is allowed to stand, *forum non conveniens* will virtually be eliminated by careful selection of the initial forum.

This dispositive effect the Third Circuit's rule gives to choice of law rules will also result in inconsistent dispositions of *forum non conveniens* motions in cases involving substantially the same or similar facts, due to differences in the applicable choice of law rules. The various American jurisdictions recognize several very different choice of law rules, such as *lex loci*, "governmental interests" and "significant contacts." If the substantive law applicable to the case is dispositive of the merits of a *forum non conveniens* dismissal, actions involving substantially similar facts will have different results in terms of *forum non conveniens*, solely because differences in the forum's conflict of law rules will lead to the application of different substantive law. An apt example of this dilemma are the opposite conclusions reached on similar facts as a result of the application of different choice of law rules in the instant action and *Dahl* v. *United Technologies*, No. 79-2596/97/98/99 (August 7, 1980), wherein a *forum non conveniens* dismissal was affirmed, decided within weeks of each other by the Third Circuit. The *forum non conveniens*

doctrine should be applied with an even hand across the board, without regard to the state or circuit in which the action is initially brought.

The decision of the Court below also raises important questions as to whether it is, or should be, the role of our federal courts to guarantee foreign plaintiffs rights and monetary recoveries the laws and courts of their own jurisdiction saw fit to withhold. It is somewhat presumptuous of the American system of justice to state that foreign nationals can only be adequately protected by our courts and our legal system and that Scotland or other countries cannot be trusted to do justice to their own citizens. The presumption of the Third Circuit that federal courts must retain jurisdiction over claims by foreign nationals to ensure that they receive the benefits of our laws is the type of parochial outlook criticized by the Court in *M/S Bremen* v. *Zapata Off-Shore Company*, *supra* at 15-16. The Third Circuit itself has aptly characterized such a claim in *DeMateos* v. *Texaco, Inc.*, *supra*, as 'a variety of social jingoism, which presumes that the "liberal purposes" of American law must be exported to wherever our multinational corporations are permitted to do business.' *Id.* at 902.

The necessary corollary to the Third Circuit's rule and its assumption that foreign plaintiffs must be treated the same as American plaintiffs and cannot be deprived of the benefits of our laws is that our federal courts must become "international courts" for the adjudication of any controversy involving an American product anywhere in the world. Neither the federal courts nor the local communities are equipped to handle such a task, and have no real interest in so doing. Not only do the federal courts not have any interest in assuming such a role, but also there is no need for such activism. Virtual-

ly all foreign countries have a judicial system which would afford these foreign claimants a hearing and recognize compensatory rules of law for injured parties. In the instant action, both Piper and Hartzell had established that Scotland recognized and applied negligence principles and various measures of damages. If the alternate, foreign country did not provide a forum for the plaintiff's claim, one of the prerequisites to a *forum non conveniens* dismissal, an alternate forum in which the suit should have been brought, *Gulf Oil Corporation* v. *Gilbert*, *supra*, would be absent. Thus the federal courts are not needed to fulfill an international judicial function, and where there is a need for a forum, the *forum non conveniens* doctrine already provides for the necessary limitations on dismissal through a different requirement.

CONCLUSION

The Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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EXHIBITS

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehily, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,
Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
C. A. No. 77-1159

Argued May 22, 1980
Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

(Filed July 24, 1980)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

This is an appeal from a dismissal of a wrongful death action on grounds of forum non conveniens. The issues include the factors to be considered in such a dismissal, the burden of persuasion on the motion, the scope of the trial judge's discretion, and the application of choice of law rules of California and Pennsylvania.

The event giving rise to this dispute was the crash of a Piper aircraft in Scotland in July 1976. The plane was owned by a Scottish air taxi service, the passengers and crew of which were Scottish. All persons aboard were killed and no witnesses survived the crash. There are indications, however, that something went wrong with the left engine for which compensatory action by the pilot was impossible, was unnecessarily difficult, or was ineptly handled by the pilot.[1]

Gaynell Reyno, a California resident and personal representative of the estates of various Scottish dece-

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1. Determination of these issues by the ultimate factfinder, of course, will be dealt with when the merits of the case are reached.

dents, sued on their behalf in a California state court. Named as defendants were Piper Aircraft Corp., a Pennsylvania corporation that manufactured the aircraft; Avco Lycoming Engine Group, which produced the engine; and Hartzell Propeller, Inc., an Ohio corporation that built the propeller. The wrongful death action is based on theories of strict liability and negligence.[2]

On motions by Piper and Avco based on diversity of citizenship, the case was removed from the California state court to the federal district court in California. After the removal, Hartzell moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Middle District of Pennsylvania under 28 U.S.C. §1404(a).[3] Piper moved to dismiss for failure to state a cause of action or, alternatively, to transfer the case to the Middle District of Pennsylvania and to strike the claim for punitive damages. The action was dismissed as to Avco with the agreement of plaintiff.

The district court in California entered an order (1) granting the motion to quash service of process as to Hartzell on the ground that personal jurisdiction over Hartzell was neither authorized by California law nor in accord with due process; and (2) transferring the case to

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2. Plaintiff contends that the engine malfunction itself was the result of a design or manufacturing defect for which Piper is liable. In addition, the following dangerous and defective conditions in the aircraft are alleged: (1) inadequacies associated with the left propeller mechanism that prevented institution of emergency procedures in the event of engine loss; (2) design and manufacture of an aircraft incapable of single engine flight with a "windmilling" propeller; (3) manufacture of an aircraft with improper instruments for maintaining single engine operation; and (4) inaccuracies and omissions in the Aircraft Owners Handbook and flight manuals pertaining to emergency procedures and single engine operating speeds.

3. That section provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

the Middle District of Pennsylvania pursuant to §1404(a).

Subsequent to the transfer, Hartzell was validly served with process in Pennsylvania and then moved to dismiss the case on the common law ground of forum non conveniens. Piper filed a similar motion captioned as a request for judgment on the pleadings or summary judgment. Both motions were accompanied by affidavits. On the basis of the affidavits, the trial judge granted the motions to dismiss because of forum non conveniens on condition that defendants submit to personal jurisdiction in Scotland and waive any statute of limitations there. Reyno filed a timely appeal.

In this Court, Reyno raises two major contentions: (1) The judge erred in not holding defendants equitably estopped to assert that Scotland was a more appropriate forum, inasmuch as Piper had maintained in California that Pennsylvania was the most appropriate forum. (2) The trial judge abused his discretion in dismissing the action. Subsidiary, but arguably crucial, to this second point is the claim that the district judge's order was based on a legal error as to whether Scottish or Pennsylvania law applied to most or all of the case.

I. THE INTERACTION OF A TRANSFER UNDER §1404(a), A SUBSEQUENT FORUM NON CONVENIENS MOTION, AND THE CONCEPT OF PRECLUSION

Reyno argues that the district court erred in not considering whether the defendants were equitably estopped from moving to dismiss. Essentially, she contends that, by following a successful motion to transfer the case from California to Pennsylvania with a motion to dismiss so that the case would have to be filed in Scotland, the defendants are trifling with the court and wasting judicial and litigant time and resources.

The district court's opinion did, however, consider plaintiff's argument and rejected it, albeit in a somewhat summary fashion:

> No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. . . . The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for forum non conveniens first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.[4]

The Court of Appeals for the Fifth Circuit has reversed the dismissal of an admiralty claim on forum non conveniens grounds for the reasons now pressed by Reyno. It declared that the defendant should not be permitted, after securing a statutory transfer from Louisiana to Georgia, to contend that Georgia was not really an appropriate forum; the defendant "may not 'so trifle with the judicial process.' "[5]

Defendants here urge, and the district court seemed to accept, that they did not take inconsistent positions before the district court in California and that in Pennsylvania. The motion in California, defendants argue, simply represented that Pennsylvania was a better forum than California, whereas the present motion contends that Scotland is better yet. Furthermore, they aver,

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4. 479 F. Supp. at 738.

5. Insurance Co. of North America v. Ozean/Stinnes-Linien, 367 F.2d 224, 227 (5th Cir. 1966) (quoting Livesay Ind. v. Livesay Window Co., 202 F.2d 378, 382 (5th Cir.), *cert denied*, 346 U.S. 855 (1953)).

any inconsistencies are a result of fuller knowledge of the relevant facts.

Examination of the motions made by defendants in California reveals that their prior allegations are indeed at variance with their present contentions. A statutory transfer, as well as a common law dismissal, must be shown to be not only more convenient, but also in the interest of justice. In meeting that burden, Hartzell asserted in California that "the plaintiffs would easily have their interests herein protected and adjudicated by application to the courts located in the State of Pennsylvania, and in fact such would be overwhelmingly fair to all the parties herein."[6] Similarly, Piper argued that "[t]he propriety of transferring the within action to Pennsylvania for the convenience of the witnesses appears to overwhelm other factors, in view of the apparent theories of liability as against the defendants."[7]

Both defendants averred that, because the claim was based on strict liability, virtually all the evidence and material witnesses as to production and design would be in Pennsylvania or Ohio.[8] Furthermore, they argue that

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6. Hartzell's Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Jurisdiction over the Person or for Transfer under 28 U.S.C. §1404(a) at 8. No. CV-77-3181-IH (C.D. Cal., filed Oct. 11, 1977).

7. Piper's Memorandum of Points and Authorities in Support of Motion to Transfer under 28 U.S.C. §1404(a) at 6. No. CV-77-3181-IH (C.D. Cal., filed Nov. 23, 1977).

8. Hartzell stated in its memorandum that "the records and employees of the . . . defendants herein are prospective evidence and witnesses, respectively." Piper asserted, "Necessarily, it would seem that all material witnesses on the liability issues reside in either Pennsylvania or Ohio." In reply to plaintiff's opposition to the transfer, Piper argued that the respective employees of Piper . . . and Hartzell Propeller, who were involved in the design, manufacture, testing, and assembly of the component parts in question, will be material witnesses, but they are located in Pennsylvania and Ohio. It is clear that the convenience of these witnesses is better served if the within action is pending in the State of Pennsylvania than if it is pending in the Central District of California."

new facts bearing on forum non conveniens were discovered after motions were filed in California.

At the time of the transfer motion all facts now alleged to be relevant — *e.g.*, where various witness are, where the crash occurred, where the wreckage was located, and who owned the plane — were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum non conveniens motion, they are hardly surprising or significantly new. What defendants really are arguing is that the case was not thoroughly researched before making the transfer motion.

Nevertheless, two factors weigh against an absolute preclusion to raise a forum non conveniens motion in this case: (1) The thrust of Hartzell's motion in the California court, and the contention accepted by that tribunal, was lack of personal jurisdiction. Arguably, then, it is not fair to make Hartzell responsible for proceedings there, even if it would be fair and proper as against Piper. (2) Forum non conveniens entails important considerations of public interest, in addition to those of the private litigants themselves. If defendants are correct in their assertion that trial in Pennsylvania would be unduly burdensome to the court and the juror community, it might be self-defeating to raise an absolute barrier to pleading forum non conveniens. Hence, although a party who moves for transfer under §1404(a) will not be automatically estopped to assert forum non conveniens after a transfer is accomplished, the fact that a party previously succeeded in a statutory transfer ought to be weighed against dismissing for forum non conveniens and as adding to a defendant's already substantial burden on the later motion.

II. FORUM NON CONVENIENS DISMISSAL

The doctrine that an otherwise validly brought claim may be dismissed because the forum chosen was inconvenient for trial had its origin in the common law of Scotland,[9] became part of the common law of many states,[10] and has a long history of use in federal admiralty actions.[11] It was introduced into federal diversity jurisdiction by *Gulf Oil Corp. v. Gilbert*[12] and *Koster v. (American) Lumbermens Mutual Casualty Co.*,[13] decided in 1974.

Simple in enunciation but complex in application, the principle of the doctrine is "that a court may resist imposition upon its jurisdiction even when" neither jurisdiction nor venue is defective.[14] Forum non conveniens as a common law doctrine has been dormant for purposes of interstate dismissals within the federal system since the passage of 28 U.S.C. §1404(a) soon after the two seminal Supreme Court cases.[15] That statute is similar to the common law doctrine, but authorizes transfers within the federal court system with a lesser

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9. Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909-11 (1947). The issue of inconvenient forum as a question on the merits rather than of jurisdiction may be traced at least to 1845. See *id.* at 909 (citing M'Morine v. Cowie, 7 Dunl. 270 (1845)).

10. *See* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929); Braucher, *supra* note 9, at 911-12.

11. The doctrine in admiralty is thought to derive from dictum in Mason v. The Ship Blaireau, 6 U.S. 143, 157, 2 Cranch 240, 264 (1804). *See* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Rev. 12, 12 & n.10 (1949); Braucher, *supra* note 9, at 920 & n.79. *But cf.* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 n.4 ("The doctrine did not originate in federal but in state courts.").

12. 330 U.S. 501 (1947).

13. 330 U.S. 518 (1947).

14. Gulf Oil Corp. v. Gilbert, 330 U.S. at 507.

15. 62 Stat. 937 (1948) (codified at 28 U.S.C. §1404).

burden — both substantively and procedurally — than a motion to dismiss.[16]

The question whether federal or state law of forum non conveniens applies in a diversity case was left open by the Supreme Court and has not definitively been decided by any court of appeals.[17] In this case, as in many

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16. The statute is a revision rather than just a codification of forum non conveniens. It permits federal courts to grant transfers on a lesser showing of inconvenience than is required under the common law doctrine and there is no need for pleadings or documents to be refiled in the transferee court. The relevant factors to be considered, however, are the same. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955).

17. The Erie question was a matter in controversy in both *Gilbert* and *Koster* until the cases reached the Supreme Court. In *Gilbert* the district court, relying on Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), held New York law to apply and dismissed the action. 62 F. Supp. 291, 294 (S.D.N.Y. 1945). The Court of Appeals distinguished *Weiss*, held that federal law controlled, and reversed the trial judge for abuse of discretion. 153 F.2d 883, 886 (2d Cir. 1946). A separate panel deciding *Koster* also applied federal law, but cautiously noted that the result would have been the same under state law. 153 F.2d 888, 890 n.2 (2d Cir. 1946). In considering the merits of the dismissal, the Supreme Court relied exclusively on Supreme Court cases, but then avoided discussion of the *Erie* problem with the following:

> The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. . . . It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

330 U.S. at 509 (citations to New York cases omitted). In *Koster* the Court was equally inscrutable. *See* 330 U.S. at 529 ("Since this case is pending in New York and is a diversity case, it is appropriate to observe that the law of New York, if applicable, is to the same effect as to the considerations to govern forum non conveniens questions in this class of cases.")

The Court's decision not to decide was sharply criticized by Professor Braucher who observed that it

> seems to have been arrived at by something like main force: in the *Koster* case it was contrary to the unanimous view of the

brought before the federal courts, federal law has been argued at all stages in the litigation.[18] Upon specific request for supplementary briefing in this Court, all three parties agree that if a choice is necessary, federal law should be followed, and cite numerous district court opinions and commentaries in support of that position.[19]

NOTE 17 — *(Continued)*

> circuit judges [that federal law applied], and in the *Gilbert* case it was reached only by ignoring the state court decision most nearly in point, which had been cited with approval by the New York Court of Appeals. Since the circuit court of appeals had not regarded the New York law as controlling, previous decisions suggest that if New York law were held to govern, the normal practice of the Supreme Court would be to remit the case to the lower court to determine that law.[123]
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> 123. Wertheim v. Clergue, 53 App. Div. 122, 65 N.Y. Supp. 750 (1st Dep't 1900); *see* Gregonis v. Philadelphia & R. C.& I. Co., 235 N.Y. 152, 139 N.E. 223, 225 (1923). The *Wertheim* case reversed dismissal of an action based upon false representations in the inducement and performance of a contract on the ground there was no discretion in "cases arising out of commercial transactions and affecting property." 53 App. Div. at 126, 65 N.Y. Supp. at 753. The Supreme Court relied on New York cases containing general statements that there is discretion to dismiss tort actions.

Braucher, *supra* note 9, at 928 (footnotes 122 and 124 omitted). Since the *Gilbert* and *Koster* cases, the Second Circuit has altered its position to indicate that the Erie question is an open one. *See* Thomson v. Palmieri, 355 F.2d 64, 66-67 (2d Cir. 1966).

18. *See* Founding Church of Scientology v. Verlag, 536 F.2d 429, 434 n.13 (D.C. Cir. 1976) ("Although the issue has never been squarely addressed by this Court, federal courts in the District [of Columbia] have in practice used the federal law of *forum non conveniens*.")

19. A footnote in *Koster* addressing the question whether federal courts have discretion to decline granted jurisdiction strongly points, along with the structure of the Court's reasoning in both *Gilbert* and *Koster*, toward use of federal rather than state law:

> Some of our cases appear to hold broadly that the federal courts must exercise their jurisdiction, when they have it. [citing cases]. But this is not a case in which it is urged that a state

They assert, nevertheless, that it is probably not necessary to decide between federal and state law because the cases dealing with forum non conveniens in both California and Pennsylvania have mirrored federal law in all essential respects. We agree.[20]

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statute restricting remedy to state proceedings defeats federal diversity jurisdiction, as [those cases] were . . . . In those cases, the Court held that when a state recognizes a cause of action, suit may be brought on it in federal court if diversity jurisdiction is established. That holding has nothing to do with this case. *We are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.*

330 U.S. at 520 n.1 (emphasis added). Moreover, in Parsons v. Chesapeake & O.R. Co., 375 U.S. 71, 73 (1963), which was not a diversity case, the Court held that "a prior state court dismissal on the ground of forum non conveniens can never serve to divest a federal district judge of the discretionary power [to transfer a case under §1404(a)]." Virtually all the district courts and commentators that have squarely faced the issue have decided to apply federal law. *See, e.g.*, Poe v. Marquett Cement Manuf. Co., 376 F. Supp. 1054, 1057-59 (D. Md. 1974); Lapides v. Doner, 248 F. Supp. 883, 885-94 (E.D. Mich. 1965); Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 834-36 (S.D.N.Y. 1957); 1A (pt. 2) Moore's Federal Practice ¶0.317[2], at 3232-33 (2d ed. 1978); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3828, at 181 & n.19 (1976).

20. Opinions of the Pennsylvania Supreme Court have adopted almost verbatim the factors to be considered that are set out in *Gilbert's* and *Koster*, scope of trial court discretion, and standard of appellate review. *See* Rini v. N. Y. Central R. Co., 429 Pa. 235, 240 A.2d 372 (1968); Plum v. Tampax, Inc., 399 Pa. 553, 160 A.2d 549 (1960). The section of the Restatement regarding forum non conveniens, on which the Pennsylvania courts also rely, in turn relies on the major federal cases. *See* Restatement (2d) Conflict of Laws §84 note (1971). California's forum non conveniens doctrine, formerly of common law origin, is now statutorily codified at Cal. Civ. Proc. Code §410.30. Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 858, 544 P.2d 947, 950, 126 Cal. Rptr. 811, 814 (1976). California law precludes, except in extra ordinary cases, a trial court

A. *Comparative Burdens, Trial Court Discretion, and Standard of Review*

A plaintiff is generally conceded the choice of forum as long as the requirements of personal and subject matter jurisdiction, as well as venue, are satisfied. He should not be deprived of the advantages presumed to come from that choice unless the defendant clearly shows facts that "either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems."[21] A court must balance these private and public interest factors, "[b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[22]

The district judge believed that the plaintiff's choice of forum is of diminished significance, and the defendants' burden of showing inconvenience correspondingly

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NOTE 20 — *(Continued)*
from dismissing on forum non coveniens grounds an action brought, as in this case, by a California resident. *Id.* at 859, 126, 544 P.2d at 950, Cal. Rptr. at 814. An exception to this limitation is made where, also as here, a California resident sues in a representative capacity for foreign beneficiaries. *See id.* at 860 & n.6, 544 P.2d at 951 & n.6, 126 Cal. Rptr. at 815 & n.6. In all respects relevant to this case, then, we find no dissimilarities in the factors considered under federal and California law. *Cf.* Jagger v. Superior Court, 96 Cal. App. 3d 579, 585-87, 158 Cal. Rptr. 163, 166 (1979) (outlining California law in manner essentially following *Gilbert* and *Koster*; concluding that satisfaction in divorce action between foreign celebrities should be deferred to English courts).

21. *Koster*, 330 U.S. at 524.

22. *Gilbert*, 330 U.S. at 508; *see* Schertenleib v. Fraum, 589 F.2d 1156, 1164 (2d Cir. 1978) ("We begin by noting that plaintiff chose this forum and defendant resides here. This weighs heavily against dismissal."); Hoffman v. Goberman, 420 F.2d 423, 426-27 (3d Cir. 1970).

less, when the plaintiff — more precisely, the real parties in interest — is foreign or when the forum chosen is not the plaintiff's home ground.[23] Neither of these burden-shifting principles may be found in opinions of the Supreme Court or this Court.

In support of the proposition that less solicitude is due a foreign plaintiff's choice of forum, the district court relied on a decision of the District Court for the Southern District of New York which stated that a foreign plaintiff's "choice of forum should be given less weight than the choice of an American plaintiff."[24] The court of appeals affirmed the judgment in that case, but disapproved of the district court's characterization of the forum non conveniens doctrine applicable to noncitizens.[25] Indeed, as the Court of Appeals for the Second Circuit has recently held, the citizenship of the plaintiff does not affect the defendant's burden under *Gilbert* and *Koster*. American citizenship of the plaintiff does not increase the defendant's burden, just as foreign citizenship may not lessen it.[26]

The holding by the trial judge that a plaintiff's choice is entitled to less weight when it is not the plaintiff's state of residency is somewhat difficult to follow when, as here, that party has already been forced to cede

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23. 479 F. Supp. at 731.

24. Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 927 (S.D. N.Y. 1977), *aff'd on other grounds*, 588 F.2d 880 (2d Cir. 1978).

25. *See* Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978).

26. Alcoa Steamship Co., Inc. v. M/V Nordic Regent, No. 78-7054, slip op. at 5960-68, 5973 (2d Cir. Feb. 25, 1980) (en banc). The court of appeals en banc thus seems to have overturned without specific mention the panel holding in Olympic Corp. v. Societe Generale, 462 F.2d 376, 378 (2d Cir. 1972), that the defendant's burden is greater if an American plaintiff is to be relegated to a foreign forum. The *Olympic Corp.* opinion was also relied on by the district court here.

the "home court advantage" as a result of the defendants' previous motion to transfer the case from California to Pennsylvania.[27] It would be the rare situation in which a defendant could complain of being vexed or harassed by defending a lawsuit on his home ground.

Of course, the Supreme Court has stated that "[t]he doctrine [of forum non conveniens] leaves much to the discretion of the court to which plaintiff resorts," but this broad proposition was followed by the explanatory observation that "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."[28] The standard of review is one of abuse of discretion,[29] but if the trial court has not held the defendants to their proper burden or has clearly erred in weighing the factors to be considered, the equivalent of an abuse of discretion has been demonstrated. Discretion must be exercised within the applicable standards.[30] The district court's wide discretion may

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27. Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 F.R.D. 445, 453 (D. Del. 1978). The district court relied on Fitzgerald v. Texaco, Inc., 521 F.2d 448, 451 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), which may have relied too literally on *Koster's* mention of deference to a plaintiff's choice of his home forum in setting forth the defendant's burden of establishing inconvenience. *See* 330 U.S. at 524. It is apparent that the *Koster* court was simply setting forth the proposition that, as between diverse citizens, convenience of a particular forum to one party will almost inevitably mean inconvenience to the other. Given this trade-off, the plaintiff's choice will generally be respected.

28. *Gilbert*, 330 U.S. at 508.

29. DeMateos v. Texaco, Inc., 562 F.2d 895, 897 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

30. *Cf.* Founding Church of Scientology v. Verlag, 536 F.2d 429, 436 (D.C. Cir. 1976) ("Where, as here, there has been no *weighing* of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused."). By way of analogy, it appears appropriate to note that on appeal from the grant of a preliminary injunction, "the standard of appellate review is simply whether the issuance of the injunction, *in the light of the applicable standard*, constituted an abuse of discretion." Doran

not serve the defendants as a burden-shifting device on appeal from an order in their favor.

B. *The Applicable Factors*

The *Gilbert* Court divided the elements to be considered into those affecting the private interests of the litigants and those in which the public has an interest. The former include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained.[31]

Also relevant is the inability to implead other parties directly involved in the controversy.[32] These various ingredients are weighed to determine the "relative advantages and obstacles to fair trial."[33]

Among the public interest factors are problems of creating court congestion and imposing jury duty in litigation centers that are removed from the origin of the controversy, the benefit in a matter of public concern of holding the trial in a place accessible to the locality, and the appropriateness of having the trial in a forum that is

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v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975) (emphasis added). Thus, an order for a preliminary injunction may be reversed if the trial court "commits an obvious error in applying the law, or makes a serious mistake in considering the proof." A. O. Smith Corp. v. FTC, 530 F.2d 515, 525 (3d Cir. 1976); *see* Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 357 (3d Cir. 1980).

31. 330 U.S. at 508.

32. *Id.* at 511; Fitzgerald v. Texaco, Inc., 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

33. *Id.* at 508.

familiar with the law governing the case rather than having a court elsewhere untangle foreign law.[34]

We will examine each of these factors to determine whether the defendants met their burden.

C. *Private Interests*

1. *Convenience of Witnesses*

If a dismissal is to be premised on the convenience of witnesses, more than a mere allegation to that effect is required. The rule for a statutory transfer, which is to be more readily granted, is no less applicable to a dismissal for forum non conveniens:

> The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than on numbers. One key witness may outweigh a great number of less important witnesses. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied.[35]

The district court opinion does not discuss the need for such a showing, but rather merely refers generally to witnesses as to damages and witnesses as to the potential supervening negligence of the Scottish air taxi service, all of whom are in Scotland.[36] Nor do the defendants

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34. *Gilbert*, 330 U.S. at 508-09.

35. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3851, at 270-71 (1976); *see* Marbury-Patillo Construction Co., Inc. v. Bayside Warehouse Co., 490 F.2d 155, 158 (5th Cir. 1974); Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 148 (10th Cir. 1967). This rule has wide authority in the district courts as well. *See, e.g.*, Follansbee Metals Co., Inc. v. John T. Clark & Son of N. H., Inc., 387 F. Supp. 574, 581 (W.D. Pa. 1974); Clay v. Overseas Carrier Corp., 61 F.R.D. 325, 331 (E.D. Pa. 1973); Shulof v. Westinghouse Elec. Corp., 402 F. Supp. 1262, 1264 (S.D.N.Y. 1975).

36. 479 F. Supp. at 732.

direct us to any affidavits setting forth the requisite specific information, and our search of the record detects none. The requirement of specificity would seem more acute in this case in view of the fact, mentioned above, that in motions before the district court in California the defendants made the claim, in some sense inconsistent with the position now taken though perhaps more accurate, that all witnesses relevant to strict liability or negligence in manufacturing are in Pennsylvania or Ohio.[37]

At the least, then, the district court did not have sufficient information to weigh the convenience of witnesses, and its conclusion that this factor favored defendants appears to be without the requisite foundation.

One further error in discerning the balance of inconvenience to witnesses deserves mention. The trial judge stated that the convenience of expert witnesses, like that of counsel, "is of small importance."[38] No explanation was given for this assertion,[39] but the theory seems to be either that expert witnesses are fungible or that their testimony can be introduced effectively by deposition. We agree with the authors of a noted treatise that this view is unsound.[40] In this case, as in many others, the testimony of expert witnesses will be crucial. Finding the most trustworthy and credible experts is not

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37. *See* pp. 5-6 & note 8 *supra*.

38. 479 F. Supp. at 732.

39. The district court cited Car-Freshner Corp. v. Auto Aid Mfg. Corp., 438 F. Supp. 82, 85 (N.D.N.Y. 1977), which simply cites other cases without explaining. The proposition seems to be traceable to Nacona Leather Goods Co. v. A. G. Spaudling & Bros., Inc., 159 F. Supp. 269, 270-71 (D. Del. 1958). the judge in that case simply concluded that the inconvenience to plaintiff's expert in one forum was counter-balanced by the inconvenience to defendant's expert of trial in the other forum. It was not that the two were insignificant, but that they cancelled each other out.

40. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3852, at 275 (1976).

often easy, and the advantages of live testimony are not to be discounted.[41]

B. *Availability of Compulsory Process and Impleader*

The defendants' major factual contention when the case comes to trial will be that the fatal crash at issue was caused not by any manufacturing or design defects, but by pilot error or the negligence of the foreign air taxi service. Inability to implead foreign third-party defendants was argued vigorously here as a problem with a trial in this country, and it has, of course, generally been considered an important consideration favoring a forum non conveniens dismissal.[42] Because there is an action pending in Scotland by the decedents' estates against the appropriate Scottish defendants, which lawsuit Piper and Hartzell have consented to join as codefendants, defendants argued, and the district court concluded, that it would be unfair and unduly burdensome for them to be subjected to both trials. Although the extra burden is readily apparent, the unfairness is not. The defendants state their point as follows:

> Defendants' inability to join [the Scottish] parties as defendants in this case would seriously prejudice Defendants, through exposure to unnecessary, duplicitous litigation, and inconsistent verdicts. If Defendants are found liable here, they will be forced to file an indemnity or contribution action in Scot-

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41. *Id.*; *see* Lykes Bros. S.S. Co. v. Sugarman, 272 F.2d 679, 681 (2d Cir. 1959); Berkshire Int'l Corp. v. Alba-Waldensian, Inc., 352 F. Supp. 831, 834-35 (S.D.N.Y. 1972) (Weinfeld, J.); Medich v. American Oil Co., 177 F. Supp. 682 (E.D. Pa. 1959) (Biggs, J., sitting by designation).

42. *See Gilbert*, 330 U.S. at 511; Fitzgerald v. Texaco, Inc., 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

land against these parties. In light of the fact that Pennsylvania and Scottish law differ greatly with respect to products liability, Piper faces the substantial possibility, and great prejudice, of being held liable on a products liability theory in this case but being forced to prove negligence in an indemnity or contribution action in Scotland. Even if the same standard of liability is applied in this action and in an indemnity or contribution action in Scotland, Defendants run the substantial risk that different juries will find different facts and, hence, produce inconsistent results.[43]

If the defendants are found liable on strict liability here but must prove negligence against the air carrier to obtain indemnity, that is not unfair, but simply the result reached under the laws of the jurisdictions in which the two companies reside. The air taxi operates exclusively in Scotland and plans its operations and expenses according to Scottish law. Piper and Hartzell reside in strict liability jurisdictions, conduct most of their business in strict liability states, and plan accordingly.

The defendants' risk of inconsistent verdicts would only exist if neither Pennsylvania nor Scotland followed principles of res judicata. Under those principles, any subsequent verdict for plaintiffs would merge with a previous favorable judgment or be barred by a prior judgment against the plaintiffs.[44] Res judicata is clearly ap-

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43. Brief of Appellee Piper at 22. Hartzell's argument on this point is simply conclusory:

> As is reinforced by the plaintiffs survivors action against the air carrier employing the pilot, the agency owning and maintaining the airplane and the estate of the pilot in Scotland, those parties should be joined as defendants and cannot be joined in the United States but could be joined in the proper Forum.

Brief of Appellee Hartzell at 13.

44. *See generally* Restatement (2d) Judgments §§47, 48, 68.1 (Tent. Draft No. 1, March 28, 1973).

plicable in American jurisdictions and we may assume, in the absence of any affidavits or citations of Scottish law to the contrary, that it is followed in Scotland as well.[45]

We therefore conclude that defendants' inability to implead other potentially liable parties would indeed make litigation here more burdensome, but defendants have not shown that it would also be unfair. It is properly a factor in their favor on the motion to dismiss, but it is not as weighty as they contend.

2. *Desirability of Viewing the Premises*

The district court concluded that, to the extent weight was to be assigned this factor, it favored defendants: "Familiarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles."[46]

It is unclear whether the trial judge in fact ascribed any significant weight to this element, and still more uncertain is what benefit a lay jury would obtain from observing the wreckage in deciding whether the plane crashed because the engine or propeller were incorrectly manufactured or the pilot was negligent. Furthermore, the topography of Scotland may, to the extent relevant, be readily proved by testimony.

D. *The Public Interest*

The parties in arguing this case, and the trial judge in deciding it, have placed the greatest importance on whether, under the applicable choice of law rules, American or Scottish law would apply to major aspects of the claims. The district court concluded that, for the most part, Pennsylvania law should apply to Piper and

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45. Defendants submitted affidavits from Scottish counsel only on the following points of Scottish law: (1) choice of law, (2) damages that may be awarded, (3) statutes of limitations, and (4) capacity to sue.

46. 479 F. Supp. at 734.

Scottish law to Hartzell.[47] Because application of different laws to the different defendants might confuse the jury, and because ascertainment of Scottish law would make the trial more difficult, the necessity of applying foreign law to a portion of the case was considered the "uppermost" factor favoring dismissal.[48]

As will be discussed below, we conclude that the district court erred in its choice of law determinations. But even if the district court were correct in its conclusion that a mixture of Scottish and American law would be required, dismissal would not have been justified under this Court's settled principles of forum non conveniens.

1. *The Necessity of Applying Foreign Law*

First, we held in *Hoffman v. Goberman* that "[i]t is settled that the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court. The district court was, therefore, in error in basing its action, in part at least, on this ground."[49] Although there may be cir-

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47. The trial court opinion stated:

> Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

479 F. Supp. at 734.

48. *See id.*

49. 420 F.2d 423, 427 (3d Cir. 1970) (footnote omitted) (law of Netherlands Antilles involved); *accord* Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 615 (3d Cir.) (Venezuelan law), *cert. denied*, 385 U.S. 945 (1966); Burt v. Isthmus Dev. Co., 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955); *see* Founding Church of Scientology v. Verlag, 536 F.2d 429, 436 (D.C. Cir. 1976) (difficulty in applying German law not sufficient).

cumstances in which the application of foreign law would present difficulties sufficient to favor dismissal — because of difficulties of translation or because the foreign law itself has principles unknown to our jurisprudence — we are not faced with such a case here.[50] Negligence principles are well-known on this side of the Atlantic and of course there will be no translation problems in dealing with Scottish law.

Second, if trial here would confuse the jury because a different country's law would apply to each defendant, that confusion would either not be eliminated by a trial in Scotland or would be eliminated only by unacceptable unfairness to the plaintiff. If, as is unlikely, a Scottish court as a "transferee" court would apply the same choice of law rulings as would the court here, it would have an equally difficult problem in applying the laws of different countries to different defendants. Dismissal here would not eliminate the difficulty, but only shift it to a foreign forum.

The district court, though, had the affidavit of Scottish counsel that Scotland's choice of law rule for torts was to apply the law of the place of injury to all facets of the case, and therefore Scotland probably would apply its own law to all claims. Even under the district court's choice of law analysis, requiring a mixture of American and Scottish law, it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But this Court has held that a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law."[51] Only when American law is not applicable, or

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50. 420 F.2d at 427.

51. De Matcos v. Texaco, Inc., 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The point is made by Professor Bickel in terms of fairness to the plaintiff. *See*, Bickel, *supra* note 11, at 28 & n.68 (because premise of forum non conveniens is

when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

2. *Choice of Law Rules Under* Klaxon and Barrack

As a federal court deciding a case premised on diversity jurisdiction, we are required by the *Klaxon* rule[52] to apply the conflicts of law rules of the state in which we sit. We are not permitted to fashion our own rules, however more clear or salutory they might seem.[53] Complicating matters here is that, for purposes of this litigation and its choice of law problems, we are in effect "sitting" in two different states. Moreover, though not entirely disinterested, each state is in the position of choosing between the laws of two other states.

The action against Piper was transferred under §1404(a) from California to Pennsylvania. The law of the transferor forum — *i.e.*, California's choice of law rules

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existence of jurisdiction, "a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true").

52. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941).

53. The Supreme Court reaffirmed *Klaxon* in strong terms in Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam) (reversing appellate court determination that, as a matter of federal choice of law, a federal court could not apply the choice of law rule of the state in which it sat if that jurisdiction had no policy interest in the case). Thus the Court has, at least for now, answered scholarly criticism of *Klaxon* and exhortations that it be overruled. *See, e.g.*, Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 32-42 (1963); Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. Rev. 1191 (1967); *cf.* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 713-18 (2d ed. 1973) (making point by rhetorical questions).

— should therefore, under *Van Dusen v. Barrack*,[54] be applied as to Piper.

Hartzell's situation is more complex. The California district court ruled that personal jurisdiction over Hartzell was lacking, both under California law and the Due Process Clause. The court did not dismiss the case against Hartzell, but rather quashed service of process and ordered transfer to Pennsylvania along with codefendant Piper. Although this Court has held that transfer under §1404(a) is proper even though the transferor state lacked personal jurisdiction,[55] that does not resolve the problem whether the *Klaxon* and *Barrack*

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54. 376 U.S. 612 (1964). The *Barrack* rule — that a transfer should work no change in the applicable law — is a "general" one. the Court added this qualifier:

> [W]e do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*
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> . . . .

Id. at 639-40 (footnote omitted). Piper does contend that a California court would have dismissed this action on the ground of forum non conveniens. This is implicit in its argument that we should now dismiss the case on that ground and that California law on this issue is the same as the federal law on which the issue has generally been argued. Both Piper and Reyno agree, however, that California's choice of law rules govern the case as to Piper. To follow the Court's caveat would, moreover, be inefficient and wasteful of judicial resources, for it would require the transferee court, after the transferor court had granted a 1404(a) transfer, to examine the transferor State's law to ascertain whether the defendant should have brought a motion to dismiss rather than to transfer in the first place. *See In re* Air Crash Disaster at Boston, Massachusetts on July 31, 1973, 399 F. Supp. 1106, 1121-22 (D. Mass. 1975).

55. In Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962), the Supreme Court held that transfer for improper venue under 28 U.S.C. §1406(a) was proper whether or not the court in which the

rules would still require us to apply the choice of laws rule of the transferor state.

To state the problem is, we believe, to explain why California's law may not apply to Hartzell: if California's exercise of jurisdiction would violate due process, so would application of that state's choice of law rules.[56] Furthermore, *Barrack* is not so rigid. The Court there stated as a *general* rule of statutory construction of §1404(a) that, to be "in the interest of justice," a transfer should not work a change in the applicable law.[57] We

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NOTE 55 — *(Continued)*
motion was filed had personal jurisdiction over the defendants. *Cf.* Martin v. Stokes, No. 78-3390, slip op. at 5-6 (6th Cir. filed June 19, 1980) ("following a transfer under §1406(a), the transferee district court should apply its own state law rather than the state law of the transferor district court") (citing cases). This Court applied *Goldlawr* by analogy to §1404(a) and held that if lack of both venue and personal jurisdiction could not defeat a transfer, then want of the latter alone could not. United States v. Berkowitz, 328 F.2d 358, 361 (3d Cir.), *cert. denied*, 379 U.S. 821 (1964).

56. *See* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of law*, 62 Cornell L. Rev. 94, 103 (1976) (forum must have reasonable due process basis for applying own law, which does not exist if party opposing application of forum's law has no minimum contacts with forum, the transaction giving rise to the claim is not connected with the forum, or application of the forum's law would otherwise be manifestly unfair).

57. The plaintiff in the *Barrack* case challenged, by writ of mandamus, the district court's order transferring the case from Pennsylvania to Massachusetts. He contended that the transfer could not be, as §1404(a) requires, "in the interest of justice," because it was likely to be accompanied by a prejudicial change in the state law to be applied. 376 U.S. at 626. The district court had held that transfer could be ordered regardless of the possibility of a change in law, *id.* at 626-27, our Court agreed with the plaintiff that it could not, *see* Barrack v. Van Dusen, 309 F.2d 953 (3d Cir. 1963), and the Supreme Court, disagreeing with both the trial and appellate courts, reversed. A transfer would not be unfair, it held, because "[a] change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms." 376 U.S. at 639.

conclude that this case comes within an exception, the possibility of which was noted in *Barrack*,[58] to the application of the transferor state's law. As with any other statute, we must construe §1404(a) to avoid any constitutional problem,[59] and so hold that when there has been an interstate transfer without personal jurisdiction, the transferor state's choice of law does not apply to that defendant. Because Pennsylvania does have personal jurisdiction, it is that state in which the federal court is located for the *Klaxon* purpose of finding the choice of law rules governing the case as to Hartzell.

Our analysis so far does not differ from that of the district court, which held that California's choice of law rules applied to Piper and Pennsylvania's rules applied to Hartzell.[60] The court went on to hold that under California's governmental interest approach the Scottish law of wrongful death would apply to make Reyno an improper litigant, but Pennsylvania's law of strict liability rather than Scotland's negligence law would govern the theory of the tort.[61] Pennsylvania's significant contacts approach was thought to require that Scottish law apply to all facets of the claim against Hartzell.[62] We must examine these rulings to determine whether they are erroneous as a matter of law.

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58. *See* note 54 *supra*.

59. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979).

60. 479 F. Supp. at 734.

61. The district court relied primarily on Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); and Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), while mentioning in passing Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976). 479 F. Supp. at 735-36.

62. *See* 479 F. Supp. at 736-37 (relying on Griffith v. United Airlines, 416 Pa. 1, 203 A.2d 796 (1964); and Lewis v. Chemetron, 448 F. Supp. 211 (W.D. Pa. 1978)).

a. *California Conflicts Law Applied to Piper*

California was a pioneering state in the governmental interest analysis approach to choice of law that was developed by Professor Currie.[63] In *Reich v. Purcell*,[64] the California Supreme Court abandoned the traditional view that the law of the place of wrong (injury) must be applied in tort actions regardless of the issues, and established in its stead the principle that "[t]he forum must search to find the proper law to apply based upon the interests of the litigants and the involved states."[65]

Also integral to the holding in *Reich v. Purcell* was the introduction into California law of the concept of "false conflicts."[66] In *Reich*, the wrongful death action arose from an automobile accident that occurred in Missouri between an Ohio plaintiff and a California defendant. Missouri, the state of injury, limited compensation for wrongful death, but neither California nor Ohio had any limitation. The California Supreme Court held that as to the issue of the extent of damages, as opposed to the standard of conduct on which liability was based, there was no true conflict in governmental interests. Since California had no limitation on damages, it had no

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63. Professor Brainerd Currie is generally considered to be the father of modern governmental interest analysis. *See* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U.S. 859 (1976); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 Vand. L. Rev. 717, 720 (1980); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392, 392-93 (1980). Most of his writing on the subject is collected in B. Currie, Selected Essays on the Conflict of Laws (1963).

64. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

65. 67 Cal. 2d 553, 432 P.2d at 729, 63 Cal. Rptr. at 33.

66. The term was not explicitly used in that case, but the methodology was. *See id.* at 555-56, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U.S. 859 (1976).

interest in protecting its resident defendant from a higher recovery. Moreover, the defendant's California insurance policy would be calibrated to the potential burdens of larger claims. Missouri had an interest in the standard of conduct for behavior within its borders, but its interest in limiting damages was solely to protect in-state defendants. It had no substantial interest in extending that protection to defendants from states with no such limitations, and Ohio, as the state where the decedents' estates were probated, did have a substantial interest in unlimited recovery. Therefore, Ohio's law as to the damages issue was applied.[67]

Subsequent cases indicate a further refinement of the governmental interest and false conflict methodology termed a "comparative impairment" approach.[68] This approach comes into practice only after a " 'preliminary analysis has identified a true conflict of the government interests involved.' " Once this preliminary step is satisfied, the court resolves a true conflict by " 'determin[ing] which state's interest would be more impaired if its policy were subordinated to the policy of the other state . . . . [T]rue conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied.' "[69]

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67. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 731, 63 Cal. Rptr. 31, 35 (1967), *see* Hurtado v. Superior Court, 11 Cal. 3d 574, 581-83, 522 P.2d 666, 670-71, 114 Cal. Rptr. 106, 110-11 (1974) (false conflict between plaintiffs' state's limitation of damages and defendant's state's allowance of full recovery; full recovery allowed). The false conflicts methodology is also attributable to Professor Currie, as well as Professor Cavers, *see* B. Currie, *supra* note 62, at 189; D. Cavers, The Choice-of-Law Process 89-90 (1965), both of whom are extensively cited in *Hurtado*.

68. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P.2d 721, 726, 148 Cal. Rptr. 867, 872 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d at 321, 546 P.2d at 723-24, 128 Cal. Rptr. at 219-20 (1976).

69. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P.2d 721, 726, 148 Cal. Rptr. 867, 872 (1978) (quoting *Bernhard*, *supra* note 68).

Among the relevant factors to be considered in determining choice of law under California's comparative impairment approach are the following:

(1) The status of the law — whether it is to be considered anachronistic or ascendant in the common law jurisdictions. " 'If one of the competing laws is archaic and isolated . . ., it may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal.' "[70]

(2) Insurance and other planning for risks. Parties may be expected to plan their activities with insurance in mind, and that planning may affect the comparative fairness of two competing rules of liability.[71]

As we have mentioned, the district court divided the case against Piper into distinct issues, and ruled that a California court would apply its law as to one and Scottish law as to others. He then employed what conflicts scholars refer to as *depecage*, defined as "the process of applying the rules of different states to determine different issues in the same case."[72] Although the California Supreme Court has not explicitly adopted this method, it is implicit in that court's analysis of cases and it is consistent with modern governmental interest analysis to examine comparative governmental interests as to each issue, to the extent the issues are separable and the bal-

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70. *Id.* (emphasis deleted) (quoting Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1216 (1946)).

71. *Id.* at 167, 583 P.2d at 734, 148 Cal. Rptr. at 872.

72. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58, 75 (1973); *see* Broome v. Antler's Hunting Club, 595 F.2d 921, 923 (3d Cir. 1979); R. Leflar, American Conflicts Law §109, at 221-22 (3d ed. 1977).

ance of comparative interests may vary.[73] We shall therefore examine separately the issues identified by the parties and the district court: the standard of liability, damages for wrongful death, and the capacity of the plaintiff to bring a wrongful death suit as a representative.

Any asserted conflict between American strict liability and Scottish negligence law is, we believe, a false one. Two basic policies underly theories of tort liability: deterrence of harm-causing conduct and compensation of persons injured by that conduct. In private tort law, in which civil rather than criminal liability is imposed, the deterrent function is accomplished by compensation of the plaintiff. The choice between holding a manufacturer liable only for negligence and holding it strictly liable for any dangerous products or design is, practically speaking, a matter both of searching for optimal deterrence of harmful conduct and of allocating the costs of injuries either to producers or consumers. A negligence standard is, broadly speaking, more protective of producers, while strict liability is more solicitous of consumers.

The perceived conflict in this case is between Scotland's interest in encouraging industry by protecting manufacturers and making it relatively more difficult for consumers to recover. Pennsylvania, by contrast, in adopting strict liability, has shifted some of the burdens of injuries from consumers to producers. By adopting this policy of increased deterrence, it hopes to make manufacturers more careful in production and design than they would be if held to a negligence standard.[74]

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73. *See* R. Leflar, *supra* note 72, at 222; Reese, *supra* note 72, at 75. The approach is also implicit in the analysis of Professor Cavers, whose work is often cited by the California Supreme Court. *See* D. Cavers, *supra* note 67, at 40-43.

74. In a recent case in which the California Supreme Court adopted comparative negligence into strict liability, the underlying policy of the latter was said to be to shift the cost of injuries from defective products from consumers to manufacturers. But the court

Applying Pennsylvania's strict liability standard to its resident manufacturer would serve that state's interest in the regulation of manufacturing. Scotland's interest in encouraging industry within its borders would not be impaired, however, by applying a stricter standard of care on a foreign corporation which has no industrial operations in Scotland. Furthermore, Scotland would have to interest in *denying* compensation to its residents for the purpose of benefiting a foreign corporation. Finally, imposition of strict liability on Piper cannot be said to be unfair to it. Inasmuch as Pennsylvania, the state in which Piper makes its product, and the vast majority of American jurisdictions in which most of Piper's aircraft are sold and fly, have strict liability,[75] that is the legal standard under which it plans its operations.

Pennsylvania's interest in deterring defects in products can be served without impairing any significant interest of Scotland. Application of Scotland's negligence

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emphasized that strict liability is not absolute liability and does not make the manufacturer an insurer of his product's safety. Daly v. General Motors Corp., 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978). In addition to spreading the costs of accidents, strict liability is intended to increase a manufacturer's incentive to produce safe products. *See id.* at 737-38, 575 P.2d at 1169, 144 Cal. Rptr. at 387. *See* Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L. J. 656 (1975) (strict liability better serves goal of optimal deterrence — minimization of accident and prevention costs); Calabresi & Hirschoff *Toward a Test for Strict Liability in Torts*, 81 Yale L. J. 1055, 1074-84 (1972) (shift from negligence to strict liability cannot be explained simply in terms of better distribution of costs; strict liability's appeal is also in greater deterrence of harmful conduct); *cf.* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1121, 1122 (1960) (one argument that has convinced courts is that supplier of goods should be responsible for the harm they cause, regardless of fault).

75. *See, e.g.*, Wade, *On Product "Design Defects" and Their Actionability*, 33 Vand. L. Rev. 551, 555 (1980) (major point of controversy in America is no longer whether strict liability should be adopted, but what its precise standards should be).

law would only harm resident beneficiaries without any countervailing benefit to its industrial economy. We therefore conclude that, as between Pennsylvania and Scottish law on this issue, a California court would apply Pennsylvania's strict liability standard. Similar considerations would govern any greater restrictions on recovery for wrongful death that Scotland may have.[76]

The district court declined to make any definitive ruling on the issue of plaintiff 's capacity to sue because of the paucity of available information for balancing comparative governmental interests. 479 F. Supp. at 735. There was thought to be no need to decide this question, because the court concluded for other reasons that the action should be dismissed and brought anew in Scotland.[77]

Because we reverse the dismissal, it will be necessary for the trial judge to decide that issue based upon

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76. Courts employing governmental interest analysis have not struggled long to determine that a state where plaintiff but not defendant resides has no interest in restricting recovery for wrongful death of its citizens against foreign corporations. *See, e.g.*, Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); *Cf.* Rosenthal v. Warren, 475 F.2d 438 (2d Cir.) (applying New York government interest analysis; New York forum would apply its own unlimited recovery rather than limitation of state of defendant where all tortious conduct occurred), *cert. denied*, 414 U.S. 856 (1973); Kuhne, *Choice of Law in Products-Liability*, 60 Calif. L. Rev. 1, 28 (1972) ("Under a governmental-interest approach, [a] proplaintiff tendency will be conceptualized . . . by imputing a greater state interest to recovery law than to those refusing recovery.")

77. On the choice of law issue as to representative capacity, the court stated: "We . . . only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make . . . any defnitive ruling on the purpose of the Scottish law or thereby the choice of law." 479 F. Supp. at 735. It later concluded only that "it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation Plaintiff would not be a proper litigant." *Id.* at 736.

additional information. If it is held that Reyno does not have representative capacity, it will be necessary to allow a substitution of parties so that the decedents' estates can bring the action directly. Such a substitution would not destroy diversity and should be granted in the interests of justice.[78]

Guiding the trial judge's decision should be the requirement of Fed. R. Civ. P. 17(b) that the capacity of an individual to sue in a representative capacity "shall be determined by the law of the state in which the district court is held."[79] In addition to examining the laws of California and Pennsylvania to determine whether Reyno has representative capacity,[80] the trial court should consider whether the defendants' challenge to the plaintiff's capacity to sue has come too late in the litigation.[81]

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78. Fed. R. Civ. P. 17(a); *see* Field v. Volkswagenwerk AG, No. 79-1710, slip op. at 24-25 (3d Cir. July 10, 1980).

79. Rule 17(b) in full provides:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held,* except [(1) a special rule for partnerships and other unincorporated associations; and (2) bankruptcy receivers].

(emphasis added); *see* General Heat & Power Co. v. Diversified Mortgage Investors, 552 F.2d 556, 557 n.1 (3d Cir. 1977) (suggesting that Rule 17(b) encompasses the state's conflict of law rules under *Klaxon*); Jacobs v. Adams, 601 F.2d 176, 178-79 (5th Cir. 1979) (applying conflicts of laws rule to determine scope of power or right to bring suit).

80. The court "is held" in California as to Piper and in Pennsylvania as to Hartzell. *See* pp. 24-26 *supra*.

81. Fed. R. Civ. P. 9(a) requires that a party desiring to raise an issue as to "the capacity of any party to sue . . . or the authority of a party to sue . . . in a representative capacity . . . do so by specific negative averment." The federal rules do not make clear when in

b. *Pennsylvania Conflicts Law Applied to Hartzell*

Citing *Griffith v. United Airlines*,[82] the district court applied the "significant contacts" approach to determine that Scotland's standard of liability, rather than that of Ohio or Pennsylvania, applied to Hartzell.[83] But a close examination of *Griffith* and, more importantly, subsequent elaborations by the Pennsylvania Supreme Court reveals that Pennsylvania's approach to choice of law is quite similar, at least for purposes of this litigation, to that of California. Pennsylvania first looks to identify and thus avoid false conflicts, and then, when a true conflict is present, exmaines and compares the competing governmental interests.

In *Griffith*, the Pennsylvania Supreme Court overturned the old rule that the law of the state of wrong governs all issues in tort actions,[84] but it did not specifically

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NOTE 81 — *(Continued)*
the stage of a litigation lack of capacity must be averred, but because lack of capacity is a dilatory defense. Professors Wright and Miller state that it "should be raised promptly. Any unreasonable delay may encourage the court to deny the objection on the ground of prejudice." 6 C. Wright & A. Miller, Federal Practice and Procedures §1542, at 640 (1971) (footnote omitted). *See* 5 *Id.* §1295, at 397 (objection to party's capacity should be analogized to an affirmative defense and waived if not asserted early in the litigation by motion or responsive pleading). The record reveals that Reyno's capacity was not challenged by Piper until it joined Hartzell's motion to dismiss after the case had been transferred to the Middle District of Pennsylvania. This motion came after Piper had moved to remove the case from a California state court to a federal court, had filed its answer to the complaint, and had successfully moved to transfer the case to the Middle District of Pennsylvania.

82. 416 Pa. 1, 203 A.2d 796 (1964).

83. 479 F. Supp. at 736-37. All three jurisdictions have contacts with or interests in the alleged tort. Scotland is the residence of the decedents and the place of the fatal crash. Hartzell manufactured the allegedly defective propeller in Ohio and it was assembled into the Piper aircraft in Pennsylvania.

84. 416 Pa. at 21-23, 203 A.2d at 805-06.

set forth the contours of that rule's replacement. In fact, as the court later indicated, once governmental interests were examined *Griffith* involved a false conflict situation.[85] The state in which an airplane crashed was held to have no interest in enforcing its limitation of damages for wrongful death when neither party was a resident.[86]

The Pennsylvania Supreme Court noted three general approaches competing to replace the old rule: (1) Professor Currie's early emphasis on applying the forum's law when the forum has a legitimate interest in the issue presented;[87] (2) Professor Ehrenzweig's stress on the interests of the parties, specifically looking to whether the defendant would have planned by insurance for the risks to which he would be exposed by the applicable law;[88] and (3) the "significant contacts" approach of the Restatement (Second) of Conflicts, under which a court applies the law of the state with the most significant relationship with the occurrence and the parties.[89] Rather than choose among these alternative approaches, the Pennsylvania Supreme Court adopted what it believed was the essence of all three: "a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court."[90]

Subsequent cases confirm that Pennsylvania courts follow a governmental interest analysis approach, with a state's contacts being considered significant only when

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85. Kuchinic v. McCrory, 422 Pa. 620, 624 & n.4, 222 A.2d 897, 899 n.4 (1966).

86. *Griffith*, 416 Pa. at 24, 203 A.2d at 807.

87. *Id.* at 14, 203 A.2d at 802 (citing Currie, *Comments on* Babcock v. Jacksons, 63 Colum. L. Rev. 1212, 1233 (1963)).

88. *Id.* (citing Ehrenzweig, *Comments on* Babcock v. Jackson, 63 Colum. L. Rev. 1212, 1243 (1963)).

89. *Id.* at 14-15, 203 A.2d at 802-03 (citing Restatement (2d) Conflict of Laws §§379, 389a (1971) and writings of its Reporter, Professor Reese).

90. *Id.* at 21, 203 A.2d at 805 (footnote omitted).

the behavior giving rise to the contact furthers or abrogates a state policy. Where the place of accident is fortuitious and the state where the accident occurred has no interest in the regulatory standard at issue, any conflict between that state and a state truly interested because, for example, it constituted the residency of the parties is, Pennsylvania appears to suggest, a false one.[91]

In *McSwain v. McSwain*, the court stated its approach as follows:

> Whether the policies of one state rather than another should be furthered in the event of conflict can only be determined within the matrix of specific litigation. What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.[92]

The latest discussion in *Cipolla v. Shaposka*[93] summarized the approach of the three cases discussed above as calling upon the court to determine which state "has the greater interest in the application of its law to the question now before us." Moreover,

> In determining which state has the greater interest in the application of its law, one method is to see what contacts each state has with the accident, the contacts being relevant only if they relate to the "policies and interests underlying the particular issue before the court." When doing this it must be

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91. Kuchinic v. McCrory, 422 Pa. at 624 & n.4, 222 A.2d at 899 & n.4.

92. McSwain v. McSwain, 420 Pa. 86, 94, 215 A.2d 677, 682 (1966) (citing *Griffith*, as well as California and New York cases).

93. 439 Pa. 563, 565, 267 A.2d 854, 855 (1970).

> remembered that a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale.[94]

These cases indicate to us that the primary approach of the Pennsylvania Supreme Court in choice of law is governmental interest analysis. Our determination as to whether the Pennsylvania court would apply American strict liability and unlimited recovery for wrongful death, rather than the negligence and damage limitations law of Scotland, therefore follows our prediction of California law. Indeed, the district court ruled that American standards of liability would control under governmental interest analysis applied as to California.[95] It is apparent, then, that the district court erred in concluding that foreign law would govern a substantial part of the case, and it is likewise apparent that the choice of law factor

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94. *Id.* at 566, 267 A.2d at 856 (quoting *Griffith*, 416 Pa. at 21, 203 A.2d at 805).

95. There is some difference between California and Pennsylvania, on the one hand, and Ohio on the other as to the standard of proof in strict liability. Ohio has adopted in full Restatement (2d) Torts 402A, subjecting to liability one who sells a product in a defective condition "unreasonably dangerous." *See, e.g.*, Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267, 168 (1977) (Syllabus by the Court); *cf.* Anton v. Ford Motor Co., 400 F. Supp. 1270, 1273-76 (S.D. Ohio 1975) (reviewing products liability decisions of the Ohio Supreme Court). Pennsylvania and California have removed the "unreasonableness" requirement as being inconsistent with the policy of strict liability. *See e.g.*, Barker v. Lull Eng. Co., Inc., 20 Cal. 3d 413, 423-27, 573 P.2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978). Indeed, our Court in interpreting Pennsylvania law has repeatedly held that use in a jury charge of the Restatement 2d's "unreasonably dangerous" language is reversible error. *E.g.*, Matlocks v. Daylin, Inc., 611 F.2d 30 (3d Cir. 1979); Bailey v. Atlas Powder Co., 602 F.2d 585 (3d Cir. 1979). Giving separate charges on the Ohio standard for Hartzell and the Pennsylvania standard for Piper need not necessarily confuse the jury.

weighted heavily in favor of dismissal for forum non conveniens.

E. *Other Elements of Public Interest*

We have held that under the applicable choice of law rules, Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute. It follows that any other public interest factors that should be considered under the Supreme Court cases of *Gilbert* and *Koster* favor trial in this country rather than Scotland.

III. CONCLUSION

Because the defendants did not meet the burden required of them for a forum non conveniens dismissal, the judgment of the district court will be reversed and the cause remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

EXHIBIT B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, *Appellant*

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

On Appeal From The United States District Court For The Middle District Of Pennsylvania
C. A. No. 77-1159

Argued May 22, 1980

Before: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

Order Amending Opinion

It is ORDERED that the slip opinion filed July 24, 1980 in the above matter be and is hereby amended as follows:

Page 7, first paragraph
should read:

> At the time of the transfer motion, critical facts such as where various witnesses are, where the crash occurred, where the wreckage was located, and who owned the plane, were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum

non conveniens motion, they are hardly surprising or significantly new.

BY THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: September 15, 1980.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES MCDOUGALL STORM, DAVID VINCENT MARAN and PETER CUNNINGHAM SCOTT, *Plaintiffs*

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE DIVISION, a Division of Avco Corporation; HARTZELL PROPELLER, INC., a corporation, *Defendants*

Memorandum

(filed October 19, 1979)

This action arises out of an airplane crash near Tulla, Scotland on July 27, 1976 in which all persons aboard were killed. The Plaintiff, Gaynell Reyno, instituted this suit as the personal representative of five decedents, William Fehilly, Liam Stuart Fehilly, William James McDougal Strom, David Vincent Moran, and Peter Cunningham Scott. Gaynell Reyno seeks general damages for the heirs and next of kin of the above decendents and damages for funeral and burial expenses in this suit styled as one for wrongful death on the basis of products liability and negligence theories. The remaining Defendants, Piper Aircraft Company and Hartzell Propeller, Inc., were the manufacturers of the aircraft and propeller respectively. A number of motions are presently before the court, a motion to dismiss filed by Defendant Hartzell Propeller, a motion for judgment on the pleadings or for summary judgment filed by Piper Aircraft, and two motions to strike a responsive brief filed by the Plaintiff. After reviewing the extensive materials submitted by all parties, we have concluded that this action must be dismissed on the ground of *forum non conveniens*. This dismissal will

be conditioned on the Defendants abiding by their stipulation to submit to the jurisdiction of the courts of Scotland and their waiver of the Scottish statute of limitations.

Several issues were raised by the motions of the Defendants. Other than their main argument that the action should be dismissed under the doctrine of *forum non conveniens*, the Defendants also asserted that under applicable choice of laws rules that the law of Scotland would control this action and that pursuant to Scottish law, the Plaintiff neither has standing nor a right to proceed under the theory of strict tort liability. This question of the applicable law is interrelated with the analysis for *forum non conveniens* and because of our decision that the Defendants have shown overwhelming reasons for dismissal under this doctrine, we need not directly confront the standing and liability issues. The Plaintiff has also raised the question of estoppel which we have found to be unpersuasive.

Our primary attention therefore is focused on the factors applicable to the doctrine of *forum non conveniens* and the question whether we should exercise jurisdiction over this action brought by reason of an aircraft accident in Scotland, in which Scottish citizens who were passengers and a Scottish pilot, acting in the course of his employment with a Scottish Air Service, were killed while flying in Scottish airspace and when all decedents' survivors, the real parties in interest, are citizens and residents of Scotland and more particularly, when the only contact with Pennsylvania is that it was the site of the manufacture of the airplane involved in this litigation, not the propeller which was manufactured and designed in Ohio, over seven years prior to the date of the fatal accident. Too much has happened from the date the airplane left the plant of Piper Aircraft, which goes to the heart of the question of liability, that the contact with this forum with respect to this action can at best be described as plainly insignificant.

The procedural history of this case is important to our decision of dismissal. The action was instituted by Plaintiff Reyno in the Superior Court of the state of California for the

county of Los Angeles in July of 1977. After being removed to federal court in August of that year, Defendant Hartzell filed a motion to dismiss the action for lack of personal jurisdiction or in the alternative to transfer the action pursuant to 28 U.S.C. §1404(a). Defendant Piper then joined in Defendants Hartzell's motion to transfer the action on November 23, 1977. The District Court entered an order on December 21, 1977 granting Defendant Hartzell's motion to quash service of process and granting the motion to transfer this action to the United States District Court for the Middle District of Pennsylvania. The quashing of service of process to Hartzell was based on due process considerations set forth in INTERNATIONAL SHOE COMPANY v. WASHINGTON, 326 U.S. 310 (1945). The court did not dismiss the action against Defendant Hartzell since valid service against it was possible in the Middle District of Pennsylvania. The importance of the transfer of the action and the quashing of service against Hartzell lies in the applicable choice of laws rule that is relevant to each Defendant under rules of VAN DUSEN v. BARRACK, 376 U.S. 612 (1964) and KLAXON CO. v. STENTOR ELECTRIC MANUFACTURING, 313 U.S. 481 (1944).

The facts as noted center on the crash of an aircraft on July 27, 1976 in which the pilot and all passengers were killed in the navigable air space near Tulla, Scotland. The aircraft involved in the accident was a Piper Model TA-23 bearing British registration mark G-AYSF which was manufactured by Defendant Piper at Lock Haven, Pennsylvania. The plane's propeller was designed and manufactured by Defendant Hartzell Propeller, Inc. in Ohio. The aircraft was being piloted at the time of the accident by a Scottish citizen and resident, over mountainous terrain in southern Scotland. Subsequent to the manufacture of the aircraft involved in this accident it was sold and delivered to a purchaser in Ohio for use in the United States. By a chain of events, apparently still unknown to the Defendants, the plane came to be owned and operated by a Scottish air-taxy company in Scotland and the British Isles. The plane was owned, operated, maintained, and

serviced by the Scottish owner for several years preceding the accident of July 27, 1976. The British Department of Trade Investigation investigated the accident shortly after its occurrence. Presently, what remains of the wreckage is in the possession of the British Department of Trade Investigation.

The Plaintiff, Gaynell Reyno instituted this action as the personal representative of the estates of five of the decedents. All of these decedents were citizens and residents of the country of Scotland. Also, all heirs and next of kin, and all those persons entitled to recover by virtue of the deaths of the passengers, (if any recovery is decreed), are citizens and residents of the country of Scotland. Plaintiff Reyno is a citizen and resident of California and is not related to the decedents.

The Defendants assert that the accident was due to pilot error or improper maintenance and servicing of the aircraft and in this respect have stated their desire and inability to join the operating company by whom the pilot was employed, the pilot's estate, and the owner and maintainer of the aircraft. A lawsuit has been brought before the courts of Scotland naming as defendants the operating company, McDonald Aviation, Ltd., the owner of the plane, Air Navigation and Trading Company, Ltd., the executor of the pilot's estate, and the Civil Aviation Authority. Also an action was commenced in the courts of Great Britain against Piper Aircraft and Hartzell propellers along with MacDonald Aviation and Air Navigation and Trading Company by a personal representative of the sixth passenger in the aircraft at the time of the accident, the only passenger not represented by Gaynell Reyno in the instant action. Therefore at least one action is pending before the courts in the United Kingdom against the present Defendants and other involved parties.

We now begin with a discussion of the factors that we believe substantially point to the dismissal of this action under the doctrine of *forum non conveniens*. We have the inherent power to refuse jurisdiction over a case such as this one where the interests of justice require that the suit be brought in a

foreign country. GULF OIL CORPORATION v. GILBERT, 330 U.S. 501 (1947); DEMATEOS v. TEXACO, INC., 562 F.2d 895 (3d Cir. 1977), *cert. denied* 435 U.S. 904 (1978); FITZGERALD v. TEXACO, INC., 521 F.2d 448 (2d Cir. 1975) *cert. denied*, 423 U.S. 1052 (1976); DAHL v. UNITED TECHNOLOGIES CORPORATION, 1472 F. Supp. 696 (D. Del. 1979).

The general factors that we must consider in determining whether to dismiss an action for *forum non conveniens* were set forth by the Supreme Court in GULF OIL CORPORATION v. GILBERT, 330 U.S. 501 (1947). Mr. Justice Jackson enumerated in that decision numerous private and public interests that should be considered under the doctrine. The factors pertaining to the private interests of the litigants are the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive" *Id.* at 508. The public factors bearing on the question include the administrative difficulties flowing from court congestion, an interest in having local controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the Court, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509.

The above cited factors have generally been followed by all courts presented with the issue of whether a case should be dismissed because a foreign forum is the more convenient one. *See, e.g.*, DEMATEOS v. TEXACO, INC., 562 F.2d 895, 899 (3d Cir. 1977); FITZGERALD v. TEXACO, INC., 521 F.2d 448, 450-51 (2d Cir. 1975); J. F. PRITCHARD AND CO. v. DOW CHEMICAL OF CANADA, 462 F.2d 998, 1000 (8th Cir. 1972); FITZGERALD v. WESTLAND MARINE CORPORATION, 369 F.2d 499, 501-02 (2d Cir. 1966); DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696, 699 (D. Del. 1979); TOP

FORM MILLS v. SOCIEDAD NATIONALE INDUSTRIA, 428 F. Supp. 1237 1252-53 (S.D.N.Y. 1977); MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 26-27 (N.D.Ohio 1977); TEXACO TRINIDAD, INC. v. ASTRO EXITO NAVEGACION S.A., 437 F. Supp. 331, 332 (S.D.N.Y. 1977); FARMANFARMAIAN v. GULF OIL CORPORATION, 437 F. Supp. 910 923 (S.D.N.Y. 1977); DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1004 (D.S.C. 1975); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 814-13 (S.D.N.Y. 1972); MCCARTHY v. CANADIAN NATIONAL RAILWAYS, 322 F. Supp. 1197, 1199 (D.MASS. 1971); OLYMPIC CORPORATION v. SOCIETE GENERALE, 333 F. Supp. 121, 123-24 (S.D.N.Y. 1971). We have carefully read each of the above cited decisions and in light of these decisions and their analysis of the Gulf Oil factors, it is clear that it would be no less than an abuse of our discretion if we did not dismiss this action on *forum non conveniens* grounds as the Gulf Oil criteria overwhelmingly point to dismissal.

The first factor that we must consider is whether an alternative forum is open to the Plaintiff if this motion is dismissed. Generally, it has been stated by the courts that the doctrine of *forum non conveniens* presupposes that an alternative more appropriate and convenient forum is available. *See, e.g.*, DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1006 (D.S.C. 1978), TEXACO TRINIDAD v. ASTRO EXITO NAVEGACION S.A., 439 F. Supp. 331, 332 (S.D.N.Y. 1977); FARMANFARMAIAN v. GULF OIL CORPORATION, 1437 F. Supp. 910, 915 (S.D.N.Y. 1977). This principle is taken from the Gulf Oil decision in which it is stated "[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process. . . ." GULF OIL at 506-07. In the instant motion the Defendants have consented to submit to the jurisdiction of the Scottish courts of law and we have noted our intention of conditioning the dismissal of this action on their submission to the jurisdiction of such courts and their waiver of any statute of

limitation. Plaintiff has an alternative forum available to her and in fact a case is proceeding in the foreign courts already.

Next, we turn to the important factor of Plaintiff's choice of forum. As stated in GULF OIL, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" *Id.* at 508. Here the Plaintiff's first choice was the California state Superior Court. Plaintiff relies on a number of cases under 28 U.S.C. §1404(a) in which the Plaintiffs were American citizens. This case, however, does not involve section 1404(a) as the determination rests on our inherent power to dismiss and it also does not involve Americans as real parties in interest. Rather, the Plaintiff is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law.

Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States. As stated in FARMANFARMAIAN v. GULF OIL CORPORATION, 437 F. Supp. 910, 927 (S.D.N.Y. 1977), when a case involves a "claim of a foreign plaintiff, [his] choice of forum should be given less weight than the choice of an American plaintiff. . . ." And in OLYMPIC CORPORATION v. SOCIETE GENERALE, 462 F.2d 376, 378 (2d Cir. 1972), the court stressed that the balance of the Gulf Oil factors need not be as strong in favor of defendants when the plaintiff is not an American citizen. *See also*, OLYMPIC CORPORATION v. SOCIETE GENERALE, 333 F. Supp. 121, 124 (S.D.N.Y. 1971); MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24 (N.D. Ohio 1977).

Also, the plaintiff's choice of forum is generally given less weight when the forum selected is not the plaintiff's home jurisdiction. FITZGERALD v. TEXACO, INC., 521 F.2d 448, 451 (2d Cir. 1975); MCCARTHY v. CANDIAN NATIONAL RAILWAYS, 322 F.Supp. 1197, 1199 (D.Mass. 1971). In this case the real parties in interest, the heirs and next of kin of William

Fehilly, Liam Stuart Fehilly, William James McDougall Strom, David Vincent Moran, and Peter Scott, are not American citizens or residents, but rather, citizens and residents of Scotland. Since the real parties in interest are not American citizens, and the forums of either California or the Middle District are not in any way their "home" forum, this factor of plaintiff's choice of forum is entitled to little weight.

The next grouping of factors that we will weigh are the private interests of the litigants, including relative ease of access to sources of proof, availability of compulsory process, cost of obtaining willing witnesses, necessity of a view of the premises, and the site of the investigation of an accident. A review of the facts in this case illustrates that all such private interests point to Scotland as the appropriate forum for this litigation.

Nearly all events relevant to this action occurred outside of the Middle District of Pennsylvania. The only connection with this forum is the fact that the plane was manufactured here over seven years before the accident. The only contact with Plaintiff's choice of forum, California, is that Plaintiff's attorney and expert reside there. Convenience to counsel or to expert witnesses, it should be noted, is of small importance in the balancing of factors. See CAR-FRESHNER CORPORATION v. AUTO AID MANUFACTURING CORPORATION, 438 F. Supp. 82, 85 (N.D.N.Y. 1977). The connections with Scotland are overwhelming. The accident occurred in Scotland, the real parties in interest are citizens of Scotland, the decedents were all citizens of Scotland, the investigation of the accident occurred in Scotland, the aircraft was owned, operated, and maintained by a Scottish company, the pilot was Scottish, the wreckage remains in the possession of the foreign authorities, nearly all witnesses needed for the defense of this suit are located in Scotland, and all witnesses to damages are located in Scotland.

The ease of access to proof element strongly points to dismissal of this action. First, all evidence as to damages, both witnesses and documents, is located in Scotland. Ease of

access to sources of proof of damages is an important factor in a wrongful death action. DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 815 (S.D.N.Y. 1972). Furthermore, nearly all witnesses necessary for the defense to this suit are located in the British Isles. For example, witnesses regarding the maintenance of the aircraft are in Great Britain, witnesses concerning the training of the pilot are located there, and witnesses relating to the investigation of the accident are in the British Isles. None of these witnesses are subject to compulsory process. Clearly, these witnesses are critical to this case and since they are located in Scotland, it would be more convenient for the witnesses and less costly for the litigants to litigate this matter in Scotland. *See*, FITZGERALD v. TEXACO, INC., 521 F.2d 448, 451 (2d Cir. 1975); DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696, (D.Del. 1979); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 815 (S.D.N.Y. 1972); TOP FORM MILLS v. SOCIEDAD NATIONALE INDUSTRIA, 428 F. Supp. 1237, 1253 (S.D.N.Y. 1977); J.F. PRITCHARD & CO. v. DOW CHEMICAL OF CANADA, 462 F.2d 998, 1002 (8th Cir. 1972); DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1004 (D.S.C. 1975).

Plaintiff relies on the argument that the essential elements needed for proof of her case are present in this forum since the plane was designed and manufactured here. We note that the alleged defective component part, the propeller, was designed and manufactured outside of this forum. Also the aircraft was manufactured over seven years prior to the accident and evidence of any changes in the plane is located in Scotland. Even Plaintiff admits that all witnesses to damages reside in Scotland. Furthermore, we cannot accept Plaintiff's argument that the evidence going to legitimately raised defenses is irrelevant to our determination. The interests of justice require that a trial be fair to all parties, not just the Plaintiff.

While there are no doubt numerous cases that have reached this same conclusion based on fundamental fairness, we will specifically point to just two. The first case we rely on

is MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24 (N.D. Ohio 1977). In MICHELL the court held that mere design and manufacture of an infant seat in Michigan was not crucial in the balancing of factors and it dismissed the suit on *forum non conveniens* grounds where the injury was to Canadian plaintiffs, involved a Canadian accident, when presentation of Canadian witnesses was necessary and could not be guaranteed in the United States. *Id.* at 25-26. All of these factors are present in the instant case and like the MICHELL court, we find the evidence relating to design in this action to be overwhelmed by the evidence needed from Scottish sources.

The second case on point on this question is DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696 (D. Del. 1979). DAHL was brought in Delaware by the personal representative of four Norwegians who died in a crash of a Norwegian owned and operated helicopter in Norwegian territorial waters against the helicopter manufacturer on the basis of design and manufacture defects. Chief Judge Latchum discussed the nearly identical factual pattern as we have here in the following manner:

> . . . a substantial amount of the testimonial evidence will come from Norwegians. Testimony from persons who knew the decedents will be relevant to the damages issue. Among the potential liability witnesses are employees of Helikopter Service AIS, employees from other firms in Norway that serviced or made installations on the helicopter, and the Norwegian government officials who investigated the accident.

Id. at 700. We think the chief judge was absolutely correct, that we must look to all evidence that is necessary for a fair trial and in this case the place to find such evidence is Scotland.

Interrelated with the above discussion is the fact that the witnesses and other evidentiary materials that are located in Scotland are beyond the reach of compulsory process of this

court. The unavailability of compulsory process to compel the attendance of witnesses necessary for a complete and fair trial has been recognized as a critical factor in the dismissal of cases for *forum non conveniens*. *See e.g.*, FITZGERALD v. TEXACO, INC., 521 F. 2d 448, 451 (2d Cir. 1975): FITZGERALD v. WESTLAND MARINE CORPORATION, 369 F.2d 499 (2d Cir. 1966); DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696, 700 (D.Del. 1979); MICHELL v. GENERAL MOTORS CORPORATIONS, 439 F. Supp. 24, 27 (N.D.Ohio 1977); TEXACO TRINIDAD, INC. v. ASTRO EXITO NAVEGACION S.A., 437 F. Supp. 331 (S.D.N.Y. 1977); DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1004 (D.S.C. 1975); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 815 (S.D.N.Y. 1972).

Finally, the absence of necessary third parties weighs heavily on our determination that the Middle District is not a suitable forum for this litigation. The Defendants have pursuasively argued that persons located in Scotland ought to be made parties to this suit. These include the pilot, the owner of the plane, and the operating company. Since the Defendants in this action cannot implead these necessary parties it would be unfair to make Piper and Hartzell proceed to trial in this forum. This inability to implead parties located in foreign counties has likewise been viewed as a critical factor by the courts. *See e.g.*, GULF OIL CORPORATION v. GILBERT, 330 U.S. 501, 511 (1946); TEXACO TRINIDAD, INC. v. ASTRO EXITO NAVEGACION S.S., 437 F. Supp. 331, 334 (S.D.N.Y. 1977); FITZGERALD v. TEXACO, INC., 521 F.2d 448, 453 (2d Cir. 1975); FITZGERALD v. WESTLAND MARINE CORPORATION, 369 F.2d 499, 502 (2d Cir. 1966); OLYMPIC CORPORATION v. SOCIETE GENERALE, 333 F. Supp. 121, 124 (S.D.N.Y. 1971); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 816 (S.D.N.Y. 1972). These potential defendants could be reached in Scotland and in fact they have been joined with the instant Defendants in a suit in the British Isles. Certainly it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses.

The last factor that we will discuss pertaining to the private interests is the necessity of a view. More generally, we believe this factor of Gulf Oil requires us to consider, as many courts have done, where the accident or event took place. All facts relevant to the crash are in Scotland, other than the fact that the manufacture and design of the plane occurred in the United States seven years before. If weight should be assigned to this "view" criteria, it certainly favors the Defendants. Familiarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles where the accident occurred.

We now will look to the factors concerning the public interest which we believe even more strongly point to dismissal. These factors include court congestion, local interest in the lawsuit, court familiarity with the law that will govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the court and the unfairness of burdening citizens in an unrelated forum with jury duty. GULF OIL CO. v. GILBERT, 330 U.S. 501, 507-09 (1946); DEMATEOS v. TEXACO, INC., 562 F. 2d 895, 899, n. 2 (3d Cir. 1977); MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 27 (N.D. Ohio 1977).

Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

The law is clear that we must apply the choice of law rule of the state in which we sit, Pennsylvania. KLAXON CO. v. STENTOR ELECTRIC MANUFACTURING, CO., 313 U.S. 487 (1941). However, when a case is transferred pursuant to 28 U.S.C. §1404(a), we then apply the choice of law rules of the state from which the case was transferred. VAN DUSEN v. BARRACK, 376 U.S. 612 (1964). Thus in this case we must

apply the California choice of law rules to Defendant Piper. In applying the choice of law rules of California we have three choices of law, California, Pennsylvania, and Scottish. With respect to Defendant Hartzell, the applicable law is not as easily arrived at.

Defendant Hartzell as previously noted, was found to have insufficient contact with the state of California and service was quashed. The District Court of California did not dismiss the action to Defendant Hartzell, but instead properly transferred the action to this forum. We use "properly" in the sense that the court had the power to transfer the action as to Defendant Hartzell even though service was quashed. Plaintiff argues that the Van Dusen rule applies to Hartzell as well as Defendant Piper, however, for the reasons that follow, we cannot accept this assertion.

The purpose of the Van Dusen rule was to prevent a party from obtaining a change in the law that would be applied to a case by seeking a transfer of the action. In essence, the Van Dusen Court ruled that a transfer under section 1404 should result in a change of courtrooms only, not a change in the applicable law. In the instant case the district court of California held that the law of California could not apply to Defendant Hartzell because of insufficient contacts with that state. The question we are presented with is whether the Plaintiff in this action can capture the law of California under Van Dusen for transportation to this district and have it apply to Defendant Hartzell when service against Defendant Hartzell was improper in California. We hold that Plaintiff cannot accomplish this. Simply, the Plaintiff cannot take advantage of the law of California when she could not properly obtain jurisdiction over Defendant Hartzell there. Thus, to Hartzell we must apply Pennsylvania choice of law rules.

First, we will briefly discuss whether California choice of law rules require that we apply California, Pennsylvania, or Scottish law to Defendant Piper. California courts follow the governmental interest approach in resolving conflict of law

issues. REICH v. PURCELL, 67 Cal. 2d 551, 432 P2d 727 (1967); HURTADS v. SUPERIOR COURT, 11 Cal. 3d 574, 522 P.2d 666 (1974). As Plaintiff states in her brief the "governmental interest approach differs greatly from the significant contacts approach utilized in Pennsylvania." The governmental interest approach, in determining the law applicable in a California forum, applies to situations involving a foreign country and the choice between the two. HURTADO v. SUPERIOR COURT, 11 Cal. 3d 574, 522 P.2d 666 (1974). The objective of the analysis is to determine the law that most appropriately applies to the issue involved.

The governmental interest approach involves three steps of analysis. First, the applicable legal issue and law must be identified. Second, the state interest underlying the law must be determined. Third, it must then be determined if that interest would be furthered through application of the states' law to resolve the specific issues involved in the case. We intend to make no definitive ruling on what law will apply under the California governmental interest analysis. Rather, our discussion will go only so far as to hold that either Pennsylvania or Scottish law will apply under the California choice of laws rules. We are relegated to this less that complete analysis because of our unfamiliarity with Scottish law which in itself is a factor supportive of dismissal of the action.

Areas of conflict are present between these three jurisdictions, i.e. Pennsylvania, California, and Scotland. First, Scottish law does not allow a personal representative to bring an action of this kind in Scotland. Under Scottish law, a personal representative may only bring an action for funeral expenses. Otherwise, an action of this type may be brought only by the deceased's relatives or dependents. We have previously stated that Gaynell Reyno meets neither of *these requirements*. Both Pennsylvania and California appear to permit such suits. Second, the law of Scotland has not adopted and does not recognize the theory of strict products liability. *The only basis* for liability in Scotland for the

manufacturer of a defective product is negligence. In contrast, both Pennsylvania and California recognize strict liability.

What interests of the state these laws promote must be identified by reference to the interpretations of the laws by the respective forum courts. California courts have held that the states interest in creating a cause of action for wrongful death lies in governing the distribution of proceeds to beneficiaries and also the interest of deterring conduct within its borders that takes life. HURTADO v. SUPERIOR COURT, 114 Cal. 3d 574, 522 P.2d 666 (1974). For the purposes of this discussion we will assume that similar interests are promoted by the Pennsylvania laws. Since the accident did not occur in either Pennsylvania or California and because none of the decedents were residents of either of these states, it would appear that the application of either Pennsylvania or California law would not further the purpose of the wrongful death laws. If the purpose of the Scottish law, permitting recovery for relatives of decendents, is similar, it would seem that its interests would be furthered by the application of the law of Scotland.

Particularly, this is true with respect to the rule of law in Scotland that only relatives or dependents of a deceased may bring an action of the type of the instant action and not a personal representative unrelated to the decedent. We, however, only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make, as we said before, any definitive ruling on the purpose of the Scottish law or thereby the choice of law. We do agree with the Plaintiff that in line with the California decisions, that the restrictions on recovery that exist in Scotland would generally not be applied in a choice of laws situation as the foreign country would likely have no interest in restricting any recovery its citizens might receive in foreign courts from foreign defendants. See, HURTADO v. SUPERIOR COURT, 114 Cal. 3d 574, 522 P.2d 666 (1974). We do not believe the provisions restricting suits of this nature to relatives of the decedents fall within this general principle

however. Such a restriction would likely be for the purpose of insuring that suits are brought by persons interested in the action so that competence of counsel and administration of a suit are in the hands of those parties with the ultimate interest.

We therefore return to our previously enunciated conclusion that the law of California would not be applied under the choice of law rules of California as that state has no interest in having its laws apply. Plaintiff admits this fact. Furthermore, we believe that Pennsylvania also has no governmental interest in having its wrongful death laws apply. For the protection of the real parties in interest in this suit we believe that the application of Scottish law would further the purpose of the laws of Scotland with respect to the restrictions on proper plaintiffs. We believe that the California courts would therefore apply the law of Scotland to this suit. Even if we assume that the Plaintiff is correct and that Pennsylvania law would be applied by the California courts to this case, this does not aid the Plaintiffs position.

There exists a conflict among the three forums in the law of products liability. Scotland only recognizes negligence as a basis for liability while the two states apply the rule of strict liability. California has no interests in having its products liability law apply and thus under the California choice of law rules it would not apply its own law. See, BERNHARD v. HARRAH'S CLUB, 16 Cal. 3d 313, 546 P.2d 719 (1976); REICH v. PURCELL, 67 Cal. 2d 551, 432 P.2d 727 (1967). Our choice is thus between Scottish law and the law of Pennsylvania.

The law of Scotland in not recognizing strict liability is more limited in terms of liability than Pennsylvania. Generally, such a restriction provides an indication that the law seeks to limit the liability of its resident manufacturers to those cases where negligence can be shown; that only culpable conduct will result in liability. If the only purpose of the requirement of proof of negligence is to aid manufacturers in Scotland, then we may assume that the purpose of the law will not be furthered by applying it to American manufacturers.

Pennsylvania's interests in recognizing strict liability is foremost in ensuring that citizens will be compensated for injuries resulting from defective products. There does exist in the imposition of strict liability on manufacturers an element of deterence. While the element of compensating injured residents outweighs the deterence factor, at least some slight interest on the part of the state of Pennsylvania would be furthered if the law of Pennsylvania were applied to Defendant Piper. No Pennsylvania governmental interest, however, would be promoted by the application of Pennsylvania law to Defendant Hartzell. Since none of the decedants nor their relatives were Pennsylvania citizens, Pennsylvania's interest in compensating its injured citizens is of little weight. While the interest of Pennsylvania in applying its laws is indeed slight, neither of the other forums has any apparent interest in applying their laws and we therefore assume that California courts would apply Pennsylvania law under the choice of law rules of California.

In summary, under the California choice of law rules, it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation, Plaintiff would not be a proper litigant. Second, the strict liability law of Pennsylvania would likely apply to Defendant Piper and not the negligence law of Scotland.

Next, we will briefly review the law that should apply to Defendant Hartzell under Pennsylvania choice of law rules. As Plaintiff accurately points out in her brief, the courts of Pennsylvania follow the significant contacts approach. In GRIFFITH v. UNITED AIRLINES, 416 Pa. 2d 1, 203 A.2d 796 (1964), the Supreme Court of Pennsylvania adopted the rule of the Restatement Second of Conflicts of Laws, section 145, which states that in a tort action, the rights and liabilities of the parties are determined by the local law which has the most significant relationship to the occurrence or to the parties. "To determine which law has the most significant relationship, the court is instructed to consider: the place

where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, place of incorporation, or the place of business of the parties; and the place where the relationship between the parties is centered." LEWIS v. CHEMETRON CORPORATION, 448 F. Supp. 211, 212 (W.D. Pa. 1978); ZURZOLA v. GENERAL MOTORS CORPORATION, 503 F.2d 403 (3d Cir. 1974); SAMUELSON v. SUSEN, 576 F.2d 546 (3d Cir. 1978). Any analysis of the relevant contacts in the instant suit leads to the inevitable conclusion that the courts of Pennsylvania would apply the law of Scotland to this action.

To reiterate some of the crucial aspects of the contacts, we begin with the fact of the accident in Scotland. The conduct giving rise to the injury occurred in one of three places, Ohio, Pennsylvania, or Scotland. The real parties in interest are domiciled in Scotland, are residents of Scotland, while the Defendants are located in Ohio and Pennsylvania. We will not outline the contact in any more detail as we find the weight of the contacts with Scotland to be overwhelming. We hold that the law of Scotland would apply in the instant action to Defendant Hartzell.

We will now once again turn our attention to the public interest factors of Gulf Oil. As Gulf Oil recognized an extremely important factor in the balance of interests is the fact that foreign law will govern all or part of a case. 330 U.S. at 508; *see also*, FARMANFARMAIAN v. GULF OIL CORPORATION, 437 F. Supp. 910, 924 (S.D.N.Y. 1977); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 816 (S.D.N.Y. 1972); MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 27 (N.D. Ohio 1977); DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1004 (D.S.C. 1975); FITZGERALD v. WESTLAND MARINE CORPORATION, 369 F.2d 499, 502 (2d Cir. 1966); MCCARTHY v. CANADIAN NATIONAL RAILWAYS, 322 F. Supp. 1197 (D. Mass. 1971). We have determined that Scottish law will govern part of this case. We, of course, are not familiar with the law of Scotland and would have to rely on experts from that country. *See*,

FITZGERALD v. TEXACO, INC., 521 F. 2d 448 (2d Cir. 1975). Clearly, it would be better for all parties for this case to proceed in a court in Scotland that is at home with the law of that country. This case is further complicated by the fact that different laws would apply to different parties. The result of this would no doubt cause hopeless confusion and would likely lead to inconsistent or an inequitable result if a trial were held here. Dismissal of this action avoids unnecessary probelems of conflict of laws and the application of foreign law.

Another factor that Gulf Oil suggests that we consider is the unfairness of burdening citizens in this forum with jury duty when this forum has little connection with the controversy. The only connection with this forum is that the plane was manufactured in this district years before this accident. Trial of this case would take weeks and we do find that it would be an unfair burden to impose this on the citizens in this community. Also, it would be a huge burden on this court in terms of both time and the costs involved. Our court is too congested for us to try an action that belongs in a foreign forum. *See*, Gulf Oil at 508509; DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1005 (D.S.C. 1975); MITCHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 28 (N.D. Ohio 1977); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 816 (S.D.N.Y. 1972); DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696, 701 (D. Del. 1979).

If we attempted to try this action in this forum the administrative and legal difficulties would be extreme. The legal problems include determining the serious and complex conflict of law questions, which this memorandum has only touched on. Likewise, the large numbers of witnesses that would be needed from Scotland, the British Isles, Ohio, and California would likely cause administrative difficulties. The physical evidence is in Scotland or the British Isles. We also note that Scotland has a large interest in the outcome of this litigation as it occurred in its airspace. The case thus may

shed light on considerations which affect the safety of its citizens. *See*, FITZGERALD v. TEXACO, INC., 521 F.2d 448 (2d Cir. 1975)). All of these matters lead us to conclude that the public interest would be better served by a trial in Scotland.

That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum. *See e.g.*, MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 27 (N.D. Ohio 1977); TEXACO TRINIDAD v. ASTRO EXITO NAVEGACION S.A., 437 F. Supp. 331, 333-34 (S.D.N.Y. 1977); FITZGERALD v. TEXACO, INC., 521 F.2d 448, 453 (Id Cir. 1975).

The Plaintiff by brief and at oral argument asserted that the Defendants should be estopped from seeking dismissal of this action on *forum non conveniens* grounds. No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. Plaintiff argues that since the case has been transferred once before and for the reasons stated by Defendants in their briefs that they should now be estopped from arguing that the Middle District is not a proper forum. A reading of the briefs filed by Plaintiff in response to the transfer motion, in accordance with this argument, would lead us to conclude that Plaintiff should be estopped from raising this argument. The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for

forum non conveniens first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.

The action will be dismissed on the conditions that the Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts,

An appropriate order will be entered.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

Dated: October 19th 1979

EXHIBIT D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO,as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, *Appellant*

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

(D.C. Civil No. 77-1159)

On Appeal From The United States District Court For The Middle District Of Pennsylvania

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel, on May 22, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 19, 1979, be, and the same is hereby reversed and the cause is remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

_____

Clerk

July 24, 1980.

Certified as a true copy and issued in lieu of a formal mandate on September 4, 1980.

Test: SALLY MRVOS

Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellant as follows:

Clerk's fees	$ 65.00
Brief	1,207.87
Reply Brief	98.58
TOTAL .	$1,371.45

EXHIBIT E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO,etc., *Appellant*

v.

PIPER AIRCRAFT COMPANY, et al.,

(C.A. No. 77-1159)

SUR PETITION FOR REHEARING

En Banc

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, AND SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellee, Hartzell Propeller, Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: August 27, 1980

EXHIBIT F

IN THE UNITED STATES DISTRICT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES MCDOUGALL STORM, DAVID VINCENT MORAN and PETER CUNNINGHAM SCOTT

v.

PIPER AIRCRAFT COMPANY, A Corporation; AVCO LYCOMING ENGINE DIVISION, A Division of Avco Corporation; HARTZELL PROPELLER, INC., A Corporation

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
:SS.
COUNTY OF LYCOMING :

CHARLES J. MCKELVEY, first being sworn, deposes and says that he is an attorney with the firm of McNerney, Page, Vanderlin & Hall, located in Williamsport, Pennsylvania and represents Piper Aircraft Corporation in the above matter; that he is familiar with the suit on behalf of Gaynell Reyno and has undertaken an investigation of the facts involved in this litigation, and the facts set forth below are true to the best of his information, knowledge and belief:

1. Defendant Piper Aircraft Corporation has formulated its preliminary plans as to who it will call as witnesses in the trial of the above-referenced case, assuming the Defendant Piper could compel the attendance of all such persons. Defendant Piper's intentions as to who it will call as witnesses are, of course, subject to change with further developments and discoveries in this case, and Piper does not intend the within list to be its final witness list.

2.Defendant Piper would call as witnesses the members of the families of the decendents and the heirs and next of kin of the decendents to testify on the issue of damages. These persons would be Defendant's only witnesses on this issue. Defendant Piper does not know at the present time the names of all such family members, but will seek to obtain the same through further discovery and further investigation of this case in Scotland.

3. Defendant Piper would call as witnesses the owners and employees of the Scottish air-taxi company which owned and operated the aircraft and hired the pilot. The testimony of these witnesses would concern the cause of and liability for this accident. All such persons are residents and citizens of Scotland. Defendant Piper does not now know the names of all such persons, but intends to ascertain the same through further investigation of this case in Scotland.

4. Defendant Piper would call as witnesses the persons who were responsible for the training and licensing of the pilot of this aircraft. The testimony of these witnesses would concern the cause of the accident and the liability thereof. All such persons are residents and citizens of Scotland. Defendant Piper does not now know the names of all such persons, but intends to ascertain the same through further investigation of this case in Scotland.

5. Defendant Piper would call as witnesses the persons responsible for servicing and maintaining the aircraft involved in this accident for the preceeding several years. All such persons are residents and citizens of Scotland. Defendant Piper does not now know the names of all such persons, but intends to ascertain the same through further investigation of this case in Scotland. These witnesses' testimony would be directed to the cause of and the liability for this accident.

6. Defendant Piper would call as witnesses two or three of its employees who were involved in the design and/or manufacture of this aircraft. Their testimony would be directed to the issue of liability. These witnesses are located either in Pennsylvania or Florida.

/s/ CHARLES J. MCKELVEY
Charles J. McKelvey

Sworn and subscribed before me this 30th day of May, 1978.

/s/ ALICE J. ANDREWS
Notary Public

My Commission Expires:

ALICE J. ANDREWS, Notary Public
Williamsport, Lycoming Co., Pa.
My Commission Expires Dec. 21, 1981

(SEAL)

Office-Supreme Court, U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-848, 80-883

IN THE

Supreme Court of the United States

October Term, 1980

PIPER AIRCRAFT COMPANY, a Corporation,
Petitioner,

v.

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, et al.,
Respondent.

HARTZELL PROPELLER, INC.,
Petitioner,

v.

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, et al.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 21, 1977—Plaintiff's original Complaint filed in the Superior Court of the State of California for the County of Los Angeles.

August 24, 1977—Petition for Removal to the United States District Court for the Central District of California filed.

August 30, 1977—Motion of Defendant Hartzell Propeller, Inc. to Dismiss for Lack of Jurisdiction Over the Person or for Transfer filed.

December 21, 1977—Order entered quashing service of process as to Hartzell Propeller, Inc. and transferring the action to the United States District Court for the Middle District of Pennsylvania.

May 15, 1978—Motion of Defendant Hartzell Propeller, Inc. to Dismiss filed.

May 15, 1978—Motion of Defendant Piper Aircraft Company for Judgment on the Pleadings or for Summary Judgment filed.

October 19, 1979—Order entered dismissing the action on condition that Defendants consent to jurisdiction of the Scottish courts and waive any statute of limitations defense.

December 7, 1979—Plaintiff's notice of appeal filed.

July 24, 1980—Opinion and Judgment of the United States Court of Appeals for the Third Circuit entered.

August 27, 1980—Order entered denying the petition of Hartzell Propeller, Inc. for rehearing *en banc*.

September 15, 1980—Order entered amending the Opinion of the Court of Appeals.

IN THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 77-3181-IH

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter C[illegible]ningham Scott,

Plaintiff

v.

PIPER AIRCRAFT COMPANY, a Corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a Corporation

Defendants

NOTICE OF MOTION AND MOTION OF DEFENDANT HARTZELL PROPELLER, INC. TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON OR FOR TRANSFER

Filed August 30, 1977

To Plaintiffs and to Their Respective Counsel of Record, Magana & Cathcart:

PLEASE TAKE NOTICE that the undersigned will bring a Motion to Dismiss for Lack of Jurisdiction Over the Person (FRCP § 12(b)) and Motion for Transfer Under 28 USCA § 1404(a) on for hearing before the above-entitled Court at Room 2, United States Court House, 312 North Spring Street, Los Angeles, California 90012, on

the 3rd day of October, 1977, at the hour of 10:00 a.m., or as soon thereafter as counsel can be heard, before the Honorable Irving Hill.

The defendant, HARTZELL PROPELLER, INC., a corporation, will move the Court as follows:

1. To dismiss this action on the grounds that defendant, HARTZELL PROPELLER, INC., is a corporation organized under the laws of the State of Ohio, with the principal place of business in the State of Ohio, and was not and is not subject to the personal jurisdiction of the United States District Court, Central District of California, and of which more clearly appears in the Affidavit of Mr. Richard Grimes, submitted herewith.

2. In the alternative, to transfer said action to the United States District Court, District of Pennsylvania, for the convenience of parties and witnesses, in the interest of justice.

• • •

ORDER QUASHING SERVICE OF PROCESS AS TO DEFENDANT HARTZELL AND TRANSFERRING ACTION TO MIDDLE DISTRICT OF PENNSYLVANIA UNDER 28 U. S. C. § 1404(a)

Filed December 21, 1977

[caption omitted in printing]

There came before the Court on December 12, 1977, for hearing the following motions:

1. Motion of Defendant Hartzell Propeller, Inc., filed August 30, 1977, to dismiss or in the alternative transfer the action.

2. Motion of Defendant Piper Aircraft Company, filed November 23, 1977, to transfer the action to the Eastern District of Pennsylvania under the provisions of § 1404(a). Since the hearing, the Court is advised that the reference in said motion to the Eastern District of Pennsylvania was a clerical error and that, as counsel for all parties agree, the motion was intended to refer to the Middle District of Pennsylvania at Williamsport.

• • •

The Court having heard argument and having considered the various Points and Authorities and other documents filed in support of and in opposition to said motions, ORDERS AS FOLLOWS:

1. The motion of Defendant Hartzell Propeller, Inc. to dismiss for lack of personal jurisdiction, is treated by the Court as a motion to quash service of said Defendant and is granted. The Court finds that the exercise of personal jurisdiction over said Defendant under the facts and circumstances of this case is not in accord with due process and is not authorized by the California long arm statute.

Cf. L. D. Reeder Contractors of Arizona v. Higgins Industries, 265 F. 2d 768 (9th Cir. 1959). The Court declines to dismiss the action as to said Defendant Hartzell in view of its order hereinafter set forth transferring the action to the Middle District of Pennsylvania in which valid service of said Defendant Hartzell can be obtained.

2. The Court grants the said motion of Defendant Piper Aircraft Company to transfer the action under 28 U. S. C. § 1404(a). The Court finds that the instant action could have been brought in said District and that the transfer of the action to said District is for the convenience of parties and witnesses and in the interest of justice. The action is ORDERED forthwith transferred to the United States District Court for the Middle District of Pennsylvania at Williamsport.

3. In the event of any appeal from either of the orders embodied herein, the Court ORDERS that a transcript of the proceedings in open court on December 12, 1977, shall be ordered by the appellant and made a part of the record on appeal.

4. The Clerk shall transmit a copy of this Order by United States mail to counsel for all parties.

DATED: December 21, 1977.

/s/ IRVING HILL
Irving Hill, *Judge*
United States District Court

MOTION OF DEFENDANT HARTZELL PROPELLER, INC. TO DISMISS AND EXHIBIT "A" THERETO

Filed May 15, 1978

[caption omitted in printing]

AND Now, to wit, this day of May, 1978, comes defendant, Hartzell Propeller, Inc. and moves this Honorable Court for an Order dismissing the Complaint on the following grounds:

1. Although the action brought by plaintiff sounds in wrongful death and purports to be on behalf of the Estates of the decedents in an aircraft accident, there is no wrongful death action in Scotland, no action may be brought under Scottish law for the death of a decedent such as is attempted to be brought here and the proper law to be applied to the case is the law of Scotland. (See Affidavit "B").

2. The Complaint sounds, inter alia, in strict liability in tort, where the applicable law, the law of Scotland, does not recognize the concept of strict liability in tort and would not apply such law. (See Affidavit "B").

3. The accident which caused the deaths of the decedents in Scotland appears to have been caused at least in part by improper maintenance of the aircraft and at least in part by improper operation of the aircraft. (See Affidavit "A", paragraphs 8, 9 and 10).

4. Service of process upon the company which had maintained the aircraft and upon the company which was operating it in commerce as an air taxi carrier does not appear possible within the United States but does appear possible in Scotland. (See Affidavit "A", paragraphs 2, 3 and 4).

5. That all parties necessary to the complete disposition of this matter can be brought before the Court in Scotland.

6. That all witnesses to the accident and most witnesses involved in the case are residents and citizens of England or Scotland and it would therefore be extremely inconvenient and unnecessarily expensive to try the case in the United States.

7. That no prejudice will be occasioned to any parties by reason of dismissing this action and allowing a subsequent action to be brought in Scotland.

WHEREFORE, Hartzell Propeller, Inc. prays this Honorable Court to enter an Order dismissing plaintiff's Complaint. And defendant will ever pray, etc.

Exhibit "A"

[caption omitted in printing]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

RONALD C. SCOTT, first being sworn, deposes and says that he is a member of the Bar of the Supreme Court of Pennsylvania, having attorney identification no. 13494, and that he is attorney for defendant, Hartzell Propeller, Inc., and is authorized to take this affidavit; that he has conducted an investigation into the accident from which this litigation arises and that the facts set forth below are true to the best of his knowledge, information and belief:

1. The aircraft involved in the accident, in which plaintiff's decedents appear to have been killed, had been manufactured in Pennsylvania prior to 1970 and sold to an American aircraft dealer.

2. That the aircraft involved in the accident was and had for a long time been owned, operated and maintained by an English air charter company which does not appear to do business in the United States.

3. That the pilot of the aircraft was a commercial pilot, a citizen and resident of Scotland and in the employ and within the course and scope of his employment as a pilot for a Scottish air taxi company, which does not appear subject to service of process in the United States.

4. That all maintenance on the aircraft for several years prior to the accident appears to have been done in Great Britain with none of it accomplished in the United States.

5. That, at the time of the accident, the aircraft was on a commercial air charter within the British Isles and was flying from England to Scotland.

6. That the accident here involved occurred in Scotland.

7. That all of the decedents appear to have been citizens and residents of Scotland.

8. That the British Department of Trade investigators found post accident indications that the nuts on all four of the mounting bolts of the propeller governor were loosened to the point at which a substantial loss of oil would occur, completely depleting the engine's oil supply in a matter of minutes.

9. That the British Department of Trade investigators found signs at the site of the accident which could be interpreted to indicate that the engine with the four loosened nuts and presumed oil leak was not developing power when the aircraft crashed.

10. That the British Department of Trade investigators found signs at the accident scene which could be interpreted as indicating that the aircraft had struck the ground in a tail spin after the pilot lost control of the aircraft upon losing power in the one engine.

11. That he has consulted with Hartzell Propeller, Inc. and with counsel for Piper Aircraft Corporation, the only two defendants who have been served in this matter, and has obtained their agreement to accept service of process in an action on behalf of the proper parties which is promptly and timely brought in Scotland.

12. That he has determined that the statute of limitations for bringing an action arising out of this accident in Scotland has not yet expired.

13. That the wreckage of the aircraft, all witnesses to the accident and subsequent investigation and all witnesses on issues relating to damages are in the British Isles and available to an action in Scotland.

/s/ RONALD C. SCOTT
Ronald C. Scott

[jurat omitted in printing]

Exhibit "B"

I, CHARLES KEMP DAVIDSON, Queen's Counsel (Scotland) depone as follows: I have been in regular practice before the Supreme Courts of Scotland for twenty two years. I graduated as Bachelor of Laws (with distinction) from the University of Edinburgh in 1956, and in the same year I was admitted to the Faculty of Advocates. I was appointed Queen's Counsel (Scotland) in 1969, and in 1977 I was elected Vice Dean of the Faculty of Advocates. In the course of professional practice I have had extensive experience in the handling of actions of damages in respect of personal injuries and death. In particular I am familiar with the Law of Scotland pertinent to the issues raised by the Edinburgh firm of Shepherd & Wedderburn, W. S. and Pennsylvania attorney, Ronald C. Scott, Esquire.

My opinion has been sought regarding certain legal aspects of claims arising out of an aircraft accident which occurred in Scotland killing six Scottish citizens and residents including the pilot. The aircraft had been built in Pennsylvania, U. S. A., equipped with engines built in Pennsylvania, U. S. A., and propellers built in Ohio, U. S. A. The aircraft involved was being piloted by a Scottish pilot who was in the employ of a Scottish aviation service. The aircraft in question may have been owned and maintained by an English air service. The survivors of the decedents are presumed to be Scottish citizens and residents.

In the above context, I have been asked the following questions and make the following answers:

1. *Question*: What body of law would the Scottish Courts apply for the purpose of assessing damages which might flow from the losses occasioned by the accident, Scottish, English, Pennsylvania or Ohio law?

Answer: In relation to both heads and *quantum* of damages the law of Scotland would be applied. I refer to *Mitchell v. McCulloch* 1976 S. L. T. 2, and authorities cited therein.

2. *Question*: Under the law of Scotland, does a cause of action exist on behalf of the estate of a decedent or which may be brought by a personal representative of a decedent for damages arising from the death of a decedent?

Answer: No. No such cause of action or claim exists under Scottish law.

3. *Question*: Is there a statute of limitations upon time within which claims may be brought by survivors for damages occasioned by the death of a decedent and, if so, what is that period?

Answer: Yes. As a general rule the period of limitation is three years from the date of death. I refer to section 17(1)(b) of the Prescription and Limitation (Scotland) Act, 1973. Exceptions to the general rule are not in point in the present case.

/s/ C. K. DAVIDSON
Davidson

[jurat omitted in printing]

MOTION OF DEFENDANT PIPER AIRCRAFT COMPANY FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

Filed May 15, 1978

[caption omitted in printing]

Defendant Piper Aircraft Company, by its undersigned attorney and pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure, hereby moves this Court for Judgment of the Pleadings or, in the alternative, for Summary Judgment, in this case on the following grounds:

(A) The Plaintiff Gaynell Reyno lacks standing to bring this action and is not qualified to act as the personal representative of the Estates of William Fehilly, Liam Stuart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott, in that she is not a relative of any of the decedents or their heirs;

(B) The complaint in this matter which sounds, *inter alia*, in strict liability in tort, fails to state a claim upon which relief can be granted because the law of Scotland does not recognize the theory of products liability;

(C) The complaint in this matter sounds in wrongful death, but there is no wrongful death action under the laws of Scotland and the laws of Scotland do not provide for an action based on the death of a decedent as is attempted by Plaintiff herein.

(D) This action should be dismissed on the ground of forum non conveniens because this action could have and should have been brought in Scotland.

(E) This action should be dismissed for failure to join an indispensable party.

Respectfully submitted,

By /s/ Charles J. McKelvey
Charles J. McKelvey
McNerney, Page, Vanderlin & Hall

AFFIDAVIT OF CHARLES J. McKELVEY

Filed May 24, 1978

[caption omitted in printing]

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF LYCOMING } *ss.:*

CHARLES J. MCKELVEY, first being sworn, deposes and says that he is an attorney with the firm of McNerney, Page, Vanderlin & Hall, located in Williamsport, Pennsylvania and represents Piper Aircraft Corporation in the above matter; that he is familiar with the suit on behalf of Gaynell Reyno and has undertaken an investigation of the facts involved in this litigation, and that the facts set forth below are true to the best of his information, knowledge and belief:

1. The aircraft accident giving rise to this action occurred in Tulla, Scotland.

2. The pilot of the aircraft was a citizen and resident of Scotland and was an employee of, and acting within the course of his employment for, a Scottish air-taxi company.

3. All persons aboard the aircraft at the time of the accident were citizens and residents of Scotland. All of the heirs and next of kin of said decedents are citizens and residents of Scotland.

4. The aircraft involved in this litigation bore British registration mark G-AYSF and was owned, operated, and maintained by a Scottish air-taxi company which is not subject to service of process in the United States.

5. All maintenance on the aircraft for the several years prior to the accident appears to have been done in Scotland or England.

6. The wreckage of the aircraft involved in this litigation is located in the British Isles and/or Scotland, and is in the possession of the British Department of Trade Investigators. It appears that the officials of the British Department of Trade Investigators is unwilling to release any of the remaining portions of the airplane to any of the parties involved in this litigation.

7. The aircraft accident involved in this litigation was investigated by a team of investigators employed by the British and/or Scottish government. The report of their investigation is located in Scotland and/or the British Isles, and the officials investigating the accident have indicated great reluctance to discuss their findings or facts with any of the persons associated with this law suit.

8. All of the evidence with respect to the damages suffered by the heirs and next of kin of decedents is located in Scotland.

9. All witnesses to the accident and subsequent investigation are located in Scotland or England and would be available to an action in Scotland.

10. The aircraft which was involved in this accident was used for commercial purposes including the transportation of passengers for hire in Scotland.

11. I have been in contact with a Scottish barrister concerning the law of Scotland in cases of this nature. The law of Scotland does not recognize a cause of action for, or the theory of, products liability. I am in the process of obtaining an affidavit from this Scottish barrister with respect to Scottish law, but administrative and transpor-

tation difficulties have caused certain delays in my receipt of this affidavit.

12. Under the laws of Scotland, the Plaintiff Gaynell Reyno would not have standing to bring this action or be qualified as the personal representative of the real parties and interests here, the heirs and next of kin of the decedents involved in the aircraft accident.

13. The named Plaintiff in this case, Gaynell Reyno, is a citizen and resident of California and is not related to any of the heirs or next of kin of the decedents or to the decedents themselves.

14. I have consulted with Piper Aircraft Corporation and counsel for Hartzell Propeller, Inc., the only remaining Defendants in this action, and have obtained their agreement to accept service of process in an action brought on behalf of the proper parties which is timely brought in Scotland.

/s/ CHARLES J. MCKELVEY
Charles J. McKelvey

[jurat omitted in printing]

[certificate of service omitted in printing]

AFFIDAVIT OF DONALD IAN KERR MacLEOD

Filed May 25, 1978

[caption omitted in printing]

I, DONALD IAN KERR MACLEOD of 33 Lockharton Avenue, Edinburgh, 14, Scotland, make oath and say as follows:

1. I am a Writer to the Signet and also Senior Litigation Partner in the firm of Shepherd & Wedderburn, Solicitors and Notaries practising at 16 Charlotte Square, Edinburgh, 2.

2. I have been asked to advise upon the position under Scots Law in relation to claims arising as a result of the crash of a Piper Aircraft in the Moffat Hills at Firthybrig Head on 26th July 1976.

3. Firstly, upon the question of products liability while there is no absolute liability on the manufacturer of a defective product liability can nonetheless be brought home if negligence on the part of the manufacturer can be established. Upon proof of negligence full damages will follow.

4. In relation to claims for damages arising out of fatal accidents Scots Law is now regulated by the Damages (Scotland) Act 1976 which came into force on 13th May 1976. As the accident giving rise to the claims occurred in July 1976 the claims fall to be dealt with in terms of the 1976 Act.

5. The basis rule under the Act is that the Executor of the deceased may only sue in respect of patrimonial losses suffered by the estate. In practice these would be limited to the funeral account and (in some cases) the cost of repairs to a motor vehicle. All other claims on behalf of relatives or dependents of the deceased must be brought by these parties themselves and must,

in addition, be brought in one action. There are provisions in Section 5 of the 1976 Act designed to prevent a multiplicity of actions.

6. Claims by relatives or dependents fall into two classes. These are:

   (1) Damages for Loss of Support. These damages are stated to be such as will compensate the relative for any loss of support suffered by him since the date of the deceased's death or likely to be suffered by him as a result of the death. The relatives who can make such a claim for loss of support are defined in Schedule 1 to the 1976 Act and comprise (A) the spouse (B) parent or child of the deceased (C) any person accepted by the deceased as a child of his family (D) ascendants and descendants (other than parents or children) of the deceased (E) brothers, sisters, uncles or aunts (or their issue) of the deceased (F) a divorced spouse of the deceased. No other person has any right to claim damages for loss of support.

   (2) Damages for Loss of Society. These damages are general damages by way of compensation for the loss of the society and guidance of the deceased. Damages under this head can in terms of Section 10(2) of the 1976 Act only be claimed by persons who were at the date of death (A) a spouse of the deceased (B) a parent or child of the deceased or (C) a person accepted by the deceased as a child of his family.

   No other claims for damages are competent.

7. I am informed and from a perusal of the papers verily believe that a person who may or may not have ob-

tained a Grant of Probate or Letters of Administration is pursuing the claims of the relatives before the US Courts. Such an action would not be competent in Scots Law. As mentioned above the claims of the relatives must be brought on their own behalf and the action must be brought by or intimated to all persons who have or may have right to claim. In that situation a separate action would be required in Scotland in respect of each deceased person.

[jurat omitted in printing]

[certificate of service omitted in printing]

TRANSCRIPT OF ORAL ARGUMENT BEFORE THE DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES McDOUGALL STORM, DAVIS VINCENT MORAN and PETER CUNNINGHAM SCOTT

v.

PIPER AIRCRAFT COMPANY, a corporation, AVCO LYCOMING ENGINE DIVISION, a Division of Avco Corporation, HARTZELL PROPELLER, INC., a corporation

Transcript of Proceedings
Argument

Before: Hon. R. Dixon Herman, J.
Date: September 13, 1978
Place: Federal Building
Harrisburg, Pennsylvania

COUNSEL PRESENT:

MICHAEL D. MOORHEAD, ESQUIRE
For—Plaintiffs

RONALD C. SCOTT, ESQUIRE
For—Defendant Hartzell

CHARLES J. McKELVEY, ESQUIRE
For—Defendant Piper

Virginia Loria
Official Reporter

[2]

THE COURT: This is a case that was transferred to me rather recently and I'm not as familiar with it as I would like to be. And I would like to know whose motion is to be argued first here, is there more than one motion to be argued and who has the laboring oar?

MR. SCOTT: I think I am first. I am Ronald Scott and I represent Hartzell Propeller and ours was the first motion filed.

Shortly after us, Piper Aircraft filed a similar motion.

THE COURT: Are these the motions to dismiss?

MR. SCOTT: Yes, sir.

THE COURT: Or motions for summary judgment?

MR. SCOTT: Ours is a motion to dismiss purely based upon forum non conveniens.

THE COURT: Hartzell's?

MR. SCOTT: Hartzell's, yes, sir. Piper's is to dismiss or summary judgment, essentially the same motion.

THE COURT: Then there was a later motion I believe by plaintiffs.

MR. MOORHEAD: No, your Honor, we are just responding to the motion made by defendants.

THE COURT: Very well, whoever wants to begin and you stand wherever it is convenient for you to stand and give me a little history of this case before you go into your legal argument.

[3]

As I understand, this was an airplane accident somewhere near Europe or the North Sea or someplace like that and a number of people lost their lives.

MR. SCOTT: Yes, sir.

THE COURT: And it is the representative of these people suing Piper Aircraft. And is the original action against Piper as well as Hartzell.

MR. SCOTT: Yes, your Honor.

THE COURT: Hartzell was not brought in by Piper?

MR. SCOTT: No, sir.

THE COURT: You may proceed.

MR. SCOTT: If I may, I will start right at the top with the background of the accident. In 1968 Piper Aircraft Corporation built a PA 23 aircraft which is a twin-engine, six place aircraft with Hartzell propellers on it.

THE COURT: What did they call that?

MR. SCOTT: They called that the Aztec. It was sold by Piper, I understand, to an Ohio dealer in 1968.

Some time thereafter—and for reasons that we will mention a little bit later—we don't know exactly when but some time apparently in the early 1970's—

THE COURT: It was sold new to this dealer?

MR. SCOTT: Yes, sir. Some time in the early 1970's this aircraft was sold abroad to a British aircraft operating company. It was involved in an aircraft accident near Tulla,

[4]

Scotland, which is just south of Edinburgh.

THE COURT: Were these engines straight reciprocal engines, no fuel injection or anything like that?

MR. SCOTT: They were Avco Lycoming six-cylinder reciprocating engine, 250 horsepower engines. Avco Ly-

coming, according to my file, has been dismissed from this action by stipulation.

MR. MOORHEAD: That's correct.

MR. SCOTT: All that remains in the case as defendants are Hartzell Propeller and Piper Aircraft Corporation.

In the spring of 1976, this aircraft was owned by a Blackpool based, Blackpool, England air—apparently what we would call an air taxi company or perhaps a fixed-base operator.

They would lease this aircraft out. On the day of the accident, a Scottish pilot in the employ of a Scottish air taxi company had five passengers in an Aztec, a different one, that flew from I think Dundee in Scotland north of Edinburgh, down to Blackpool and they had a circuit to follow. They had three or four stops to make over the course of the day.

Their aircraft went down in Blackpool and they changed to this aircraft that was later involved.

THE COURT: You would say this was a normal landing?

MR. SCOTT: It was a normal landing but it broke, they couldn't get it off. For some reason or another, we don't know

[5]

why, but just based upon the report of the British Department of Trade, they changed aircraft. And the pilot from the Scottish air carrier simply leased this aircraft from the Blackpool company. I don't know whether there was any connection between them or not.

They flew that all day, came back to Blackpool, expecting to find their aircraft back in commission, it wasn't. So they went back into the airplane that they had been flying all day.

They took off—do I understand that you have some flying experience?

THE COURT: Yes.

MR. SCOTT: They filed IFR out of Blackpool and they got about a third of the way along and found that their radios, they weren't getting proper reception. They suspected it was their own gear, so they cancelled IFR and filed VFR. They were in radio contact as they went over the border into Scotland and the highlands started coming up to them.

The last that was heard of this aircraft was that they reported they were climbing from three thousand feet at which they were below the overcast to thirty-five hundred feet at which they were above the overcast. This was about 50 minutes after they had taken off. And they were near Tulla, which is just north of the border. They were into Scottish territory.

[6]

The next thing that was found was this aircraft wreckage on the ground with indications on it: One, that it had entered a spin and apparently a flat spin. It had come down nearly vertically with a lot of rotation on it. There were indications of no power and possibly no rotation on the left engine. There were indications of power and definite rotation on the right engine.

The propeller locks which are devices that keep the propeller from feathering when you shut the engine down were found engaged on the left engine. This could have happened at the time of impact or it could not have. But nobody knows one way or the other. And that was about it.

Except for one apparently very significant feature that the investigators found on the left engine. The pro-

peller was a constant speed propeller. It was driven, controlled by a governor, which is run by engine oil. This governor has a little pump in it, it has high pressure engine oil going into it and it increases the pressure of the oil and it controls the pitch of the propeller hydraulically.

THE COURT: The pilot controls it, doesn't he?

MR. SCOTT: The pilot controls the governor, he has an input into the governor itself but the governor sets the pitch of the propeller so that the selected rpm will be maintained.

There are four mounting bolts for this governor on the

[7]

engine. All four of those bolts were found backed off approximately equally. There were marks on the governor itself, on the metal of the governor made by the star washers indicating that those nuts had at some time been torqued down sufficiently to bite into the metal. And yet all four of those nuts were found backed off approximately equally.

There were tests run by the British Department of Trade investigator. He found that the space that was between the governor and the engine block was sufficient to allow the entire capacity of engine oil to escape in seven minutes. Which means that somehow, some time during that flight, apparently in the last few minutes, all four of those nuts backed off immediately. Which indicates to me a very strong probability that when the aircraft was on the ground, a mechanic had started them off.

At any rate that—at least somebody that we can't reach in this Court started them off. They were all killed in Scotland. They were all Scottish citizens. Their survivors are all Scottish citizens. Nevertheless, someone whom I'm told is an employee of the plaintiffs' law firm

was appointed a personal representative by a court in California and a lawsuit was started in the state court in California.

THE COURT: How did that happen, do you know?

MR. SCOTT: I don't understand California, Judge, I don't know. It certainly is not in keeping with Scottish law.

[8]

At any rate, this woman, Gaynell Reyno, was appointed by a California court as personel representative of the estates.

Action was brought in the state court in California, it was removed by Piper Aircraft Corporation, I believe, it might possibly have been Hartzell—no, I'm sorry, it wouldn't have been Hartzell, it might possibly have been Avco Lycoming. But it was one of those two, removed it to the federal court. At that point Hartzell filed a motion to dismiss or, in the alternative, a motion to transfer.

THE COURT: To where?

MR. SCOTT: I think we requested Pennsylvania if we weren't dismissed. The court found—and this is the first legally significant fact—let me read this to you: The court found that Hartzell was not in California.

And the phrasing of the order, it is attached to my reply memorandum I believe it's Exhibit A, page two. The court having heard argument and having considered the various points and authorities and other documents filed in support of and in opposition to said motion orders as follows: The motion of defendant Hartzell Propeller, Inc. to dismiss for lack of personal jurisdiction is treated by the court as a motion to quash service of said defendant and is granted.

The court finds—and this is the significant part—the court finds that the exercise of personal jurisdiction over said defendant under the facts and circumstances of this case

[9]

is not in accord with due process and is not authorized by the California long-arm statute.

That was not appealed, that is page two of Exhibit A, paragraph numbered one. That was not appealed. It is the law of this case that Hartzell's contacts with California are insufficient to allow an action there to proceed against it under the due process clause.

I believe in my reply brief, to which that is an exhibit, you will see reference to several articles in the Cornell Law Review and this morning we were by your chambers and noted that you do have those articles right there.

THE COURT: I don't know how far back I have them.

MR. SCOTT: You do. There are 61 and 62 volumes. They are fairly long and I won't say that I understand entirely the distinctions that they are trying to make between due process and full faith and credit on the decisions.

But the one point that does come through very clearly in all of those articles and in the decisions that are discussed in them is that ever since 1920 in the Deck case, there has been a recognition that in choice of law, as well as in application of the courts in persona jurisdiction, there are due process requirements. There must be certain minimal contacts in choice of law to apply a state's law to a defendant, just as there must be certain minimum contacts and they are apparently the same, in order to apply in persona jurisdiction.

[10]

It follows then, point number two, that California law cannot constitutionally be applied to Hartzell Propeller, Inc. under the law of this case which finds that we are not there.

Therefore, since the only court where we have been served and where we are present is the District Court for the Middle District of Pennsylvania under Winesky versus Eastern Airlines, the choice of law is the grouping of the contacts. Pennsylvania rule, grouping of the contacts.

The reason I have gone into that particularly is because the choice of law is really the only point at which it appears that plaintiffs are even attempting to refute the points raised in my initial memorandum on my motion to dismiss. The Pennsylvania rule is the grouping of the contacts.

Here we have six plaintiffs—and I don't even know yet how many—decedents' survivors who are all located in Scotland. We have an accident in Scotland. We have a carrier who was running this operation commercially in Scotland who should be a party and I will come to that later.

We have the maintaining people who are at least in Great Britain, possibly in Scotland. All of them on the other side of the ocean. We have an accident that involves operation in English and Scottish air space.

The only thing that there is in Pennsylvania is that the aircraft which happened to be carrying those people at the

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time they died was built some nine years earlier or eight years earlier in Pennsylvania. And that the propeller—that's really not a Pennsylvania contact, we are an Ohio corporation.

So far as choice of law is concerned, at least as to Hartzell—and it is important that a distinction be made between Piper and Hartzell—with us, it seems perfectly clear that Scottish law has got to apply. Which presents practical problems, as you are well aware, sir.

In my original motion to dismiss, I have an affidavit and there was another affidavit filed by Mr. McKelvey on behalf of Piper, the affidavit of Donald McCloud. This is my document number seven is my motion. And the affidavit of Mr. Davidson who is—I think they call him vice dean of the Edinburgh trial bar.

I sent certain questions to him and one of them, question two under the law of Scotland, does a cause of action exist on behalf of the estate of the decedent which may be brought by a personal representative of the decedent for damages arising from the death of a decedent.

And his answer, sir: No, no such cause of action or claim exists under Scottish law. This is further carried in Mr. McCloud's affidavit in which he explains the damages, such as they are, are recoverable by the survivors, the survivors' claims caused by the death of the decedents.

It follows then, sir, that Gaynell Reyno as to Hartzell

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under Scottish law which does not recognize the right of a personal representative to bring such an action, Gaynell Reyno does not have any standing to bring a lawsuit against Hartzell in Pennsylvania.

I want to talk a little bit more generally, sir, about the general business of the forum non conveniens dismissal. The leading case on that as I have cited in my brief was Gulf Oil versus Gilbert, U. S. Supreme Court 1947. And in that case the various criteria for dismissal under forum non conveniens were discussed. I'm sure your Honor is aware that the Third Circuit in the relatively recent case

against Texaco has approved forum non conveniens, that was the Jones Act case, in which actually there was a heavier burden because of the precise wording of the Jones Act upon the defendant to move the case out.

But it has been approved not only in other states and other circuits but also in this circuit. The criteria are set forth on page three of my brief and they are analyzed in cases that come on later on. I'm not going to go through all of them, sir. I do want to mention one case in particular, the Michell case, Michell versus General Motors, because it is the Northern District of Ohio and we are an Ohio corporation. And also because there is a distinction, there's a similarity that is I think sort of dramatic.

Michell involved a baby who was riding in an automobile in a GM infant loveseat. The automobile was involved in an

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accident, the child was thrown from the loveseat instead of being retained in it. In the stated pleadings, it was assumed that that was a defect on the part of GM's design and manufacture. And that design and manufacture had been done in the United States.

Nevertheless, the accident had occurred to Canadian citizens, the accident occurred in Canada. And the court dismissed, saying: Go back to Canada, it's not convenient to try the case here. All of your witnesses to the accident are there. Sure, the seat was designed in the United States and it may be that you will have to come to the United States to depose witnesses at General Motors as to how this was designed and what the manufacturing technique was. But nevertheless, the basic information, what the damages were in the area where the accident happened, how the accident happened, they are all in Canada. And the people are Canadian.

And the court—I quoted the court in two paragraphs and if you will bear with me, I would like to read them. I'm reading from page five of my memorandum. The court while recognizing that the alleged fault of General Motors occurred in the United States dismissed saying quote this court sees no reason why it or any other U. S. court should undertake the task of hearing and deciding this lawsuit involving alleged injury to Canadian plaintiffs from a Canadian accident, the trial of which will involve the application of Canadian law and

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the presentation of Canadian witnesses, whose live testimony cannot be guaranteed in this country. I think it is a pretty good analogy to the situation we have here.

The court discussed the applicability of product liability law to the accident involving the Canadian citizens. It says: If Ontario has a product liability law which is stricter against alleged tortfeasors than Ohio or Michigan law, plaintiffs should receive the benefit of that law. If, however, Ontario does not protect its citizens in this area as fully as Ohio or Michigan, the Ontario plaintiffs are not entitled to assert the more liberal United States laws as a basis for their suit. In such a case, Michigan and Ohio state interests will be fully protected since their citizens retain protection of these stringent laws and General Motors will have to conduct all of its design and manufacturing operations in light of these laws in designing and producing different infant seats for its different geographical markets. There being no countervailing government interest at stake, this should be governed by the substantive law of Ontario. Which I think bears very directly on this case.

You will see in my brief the analysis of the various considerations that have developed out of the opinion in

Gilbert and I will go through them without going through their history. You can get that in the brief.

First, is the relative ease of sources of proof.

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Where can proof best be gotten. Of course, all of the witnesses to the accident, all of the witnesses to damages, all of the witnesses to maintenance of the aircraft—and this was an eight or nine year old aircraft—they are over there. We can't reach them, our subpoena can't go that far. We haven't even an opportunity to go further than the very limited investigation that the British Department of Trade conducted.

They didn't even interview, incidentally, sir, they didn't even interview any of the mechanics at the airports where this aircraft stopped over the course of that day to ask them: Did they do any work on it? I have personally spoken with the investigator in charge of this. He told me he got on the telephone and he spoke to the head man of the operation from which the plane had flown and said: Do you know whether any of your people or did any of your people work on that airplane? And he said I don't know of any work being done on the airplane. And he wrote it down: No work was done on the airplane.

That as your Honor is well aware is certainly no beginnings of an adequate investigation of the cause of the accident.

The plaintiffs, the survivors, all witnesses as to the measure of damages, what is a Scottish life worth? How do we get the testimony of that here. It is so much easier to get it over there.

All witnesses regarding the training of the pilot and

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the supervision given the pilot. This pilot, sir, had been a licensed commercial pilot for three months when this

accident happened. He had a total of 100 hours in this type aircraft, according to his log book.

THE COURT: He must have had an instrument rating.

MR. SCOTT: He had an instrument rating and it was three months old. He had just finished flight school. So far as we have been able to determine—and that's limited—we have no indication of any recurrent training having been required by the company for which he was working. Despite the fact that this man was going out under instrument conditions in an aircraft in which he should have been able to handle ordinary bad weather and ordinary emergencies.

His log book, I am told, contains no indication of his ever having had practice in coping with emergencies from the time he left flight school until the time this accident happened.

Witnesses as to that are not in the United States, they are in Scotland. All of those witnesses would be subject to compulsory process in the Scottish court. Anybody from Pennsylvania or from Ohio who would be deposed, their testimony would have to be taken by deposition anyway.

Lock Haven, where Piper Aircraft Corporation is, is far enough away that people are not simply going to be commuting, there are going to be depositions to record testimony taken.

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Whether the plaintiffs' attorney has to come a one-day flight from Scotland to Pennsylvania or in a one-day flight from California to Pennsylvania really doesn't make any difference. Same thing with Piqua, Ohio, central Ohio. It's as hard to get to from California as it is from Scotland.

The second criterion is the availability of compulsory process to require the attendance of witnesses and that's covered by the location of the witnesses. We can't subpoena people over in Scotland or in England.

Congestion of the courts. This Court doesn't need any more business. That's one of the criteria that the Supreme Court talked about. They said administrative difficulties follow courts when they take on litigation in congested centers instead of its being handled at its origin. This can very well be handled over in Scotland.

Jury duty. Judge, this is a trial that's got to take a month. Should we impose upon citizens of the Middle District of Pennsylvania a month out of their lives to listen to a case and decide a case that involves no Pennsylvania interest, that is solely for the benefit of foreign citizens. It's an unreasonable burden.

Finally—or not finally—but one of the last points that the Supreme Court said in the Gilbert case, that was a diversity case, that was transferred from New York to I think West Virginia where there would be a change in law.

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They said: There's an appropriateness too in having the trial of a diversity case in a forum that is at home with the state law that must govern the case. Rather than having a court in some other forum untangle problems in conflict of laws and in laws foreign to itself.

Judge, at least as to Hartzell Propeller, Inc., Scottish law is going to have to be applied to this case and we are going to have to learn Scottish law if the case is to be tried here. I enjoy learning the law but a whole new body of law is a bit much. And I think it is a very compelling reason to send this back home.

The need to implead further parties who cannot be reached in the sending forum, this I propose is the sending

forum. The people who trained this pilot. The pilot's employer the carrying company, the people who maintained this aircraft. All of them should be parties in this lawsuit and they cannot be reached in the United States. And it is grossly unjust not to have them parties in this litigation.

If the argument is made that we could if there is a verdict handed down against us, go back to England or Scotland and try to get contribution, the measure of damages would be different handed down by an English or Scottish court on contribution to what would be encountered here. And it seems to me fairness would indicate that everything be handled under the same rules.

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Finally, the interest of a foreign nation in the events leading to the accident. And certainly, this is a commercial air flight. Great Britain has a lot of interest in the disposition of a case involving an air crash in its territory which is being operated, the aircraft is being operated, being maintained, the pilot was trained—allegedly—in its country. They have a lot of interest in that.

Of all of these points, none are refuted by the plaintiffs. All they say in their answer—first of all, they lump Piper and Hartzell together, we are defendants. We are not, I'm Hartzell, he's Piper. He has an entirely different motion. And he has different bases. I'm here the first time, he was out in California. My motion they say somehow California law should apply, California choice of law would apply to Pennsylvania rules and therefore Pennsylvania damages and Pennsylvania law would be applicable.

That doesn't apply as we saw right in the beginning. Pennsylvania law mandated by California choice of law rule cannot apply here because of the constitutional limitations, because we were not in California.

The answer filed by the plaintiffs to my reply memorandum says Van Dusen versus Barrack, Van Dusen versus Barrack, Van Dusen versus Barrack. As you know generally the rule in Van Dusen versus Barrack is where there is a transfer from one district to another, the law follows the case. That

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applies to the Van Dusen versus Barrack situation where all parties were present. I have not seen a single case in which the court applied the law of the transferor state and was affirmed on that when it was applied against a party who was not a party in the transferor state.

There are definite limitations—and you will see that in my reply brief. In the Van Dusen opinion itself, definite limitations to the power or to the rule that—I will give you a page—I'm sorry, to my answer to the reply brief. It is the last document. My motion to strike or in the alternative answer to plaintiffs' response to defendant Piper and Hartzell's reply memorandum. My motion to strike, you know the reason for that. The document that was filed simply has no bases in our rules.

But if you accept the document, if you look on page two, the thrust of Van Dusen versus Barrack was that the transfer of a case shall not work a change in the law as to any party. No party may benefit or be hurt by a transfer. However, if as plaintiffs argue the California law, choice of law, were applied by this Court against Hartzell when it has already been established that California could not apply it, the transfer would in fact change the law as to Hartzell. I have it written right in there and I don't need to bother you any more.

THE COURT: All right, I understand.

Before I take the reply to that, I would like to hear

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from Piper and then have the plaintiffs' argument at one time contra to both motions.

MR. MCKELVEY: Your Honor, my names is Charles McKelvey, I represent Piper.

THE COURT: And you are from Williamsport.

MR. MCKELVEY: Yes, sir.

Essentially Piper takes the position that the case should be dismissed on the basis of forum non conveniens, on the basis that Gaynell Reyno has no standing to sue and that the law of Scotland requires that the plaintiff prove negligence in a case of this type and that the law of Scotland should be applied to Piper in this case.

THE COURT: How does the case against you differ from that against Hartzell except for the fact that you were in the case in California and Hartzell was not. Is that the only distinction?

MR. MCKELVEY: That's the only distinction, your Honor, the airplane was built in 1968 in Lock Haven, it's an Aztec airplane.

THE COURT: The propeller was built in Ohio?

MR. MCKELVEY: That's right, and we installed the Hartzell propeller in 1968 and sold the airplane and know nothing more about it since that time, really.

THE COURT: What happened in California as far as you were concerned?

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MR. MCKELVEY: The case was brought by Gaynell Reyno against Hartzell, Piper and Avco. There were many pleadings back and forth. And as far as we were con-

cerned after Avco was let out, at some point Piper joined in a motion by Hartzell—Hartzell's motion was dismissed because of lack of jurisdiction and in the alternative transferred to the Middle District. Piper joined in the motion to transfer to the Middle District. Hartzell's case went off on jurisdiction or was dismissed in California because of lack of service.

THE COURT: Why was Piper not, didn't they get service in California on Piper?

MR. MCKELVEY: They did, and Piper never raised that issue.

THE COURT: You have enough activity in California?

MR. MCKELVEY: Apparently.

THE COURT: I would have thought Hartzell would too but apparently not.

MR. MCKELVEY: Apparently not, at least it wasn't proved. Now we are back here and I am convinced that Mr. Scott is correct that as against Hartzell the law of Scotland must be applied.

Our opponents will claim that as against Piper, products liability law of Pennsylvania must be applied. So this Court will be asked to apply negligence against Piper—or negligence against Hartzell—product liability against Piper.

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THE COURT: You mean if Scottish law has to be applied against Hartzell, there's no product liability law there, is that what you were saying?

MR. MCKELVEY: That's correct, your Honor. And we have an affidavit from the barrister in Edinburgh, Donald McCloud, it's in the file and it is uncontradicted.

And Mr. McCloud states that—point two: I have been asked to advise on the position under Scottish law in relation to claims arising as the result of the crash of the Piper aircraft in Moffat Hills of Firthybrig on July 26, 1976. Firstly, upon the question of product liability, while there is no absolute liability on the manufacture of a defective product, liability can be brought home if negligence on the part of the manufacturer can be established. So the burden vis-a-vis Hartzell is to prove negligence.

Plaintiffs claim that the burden against Piper is product liability. Two standards of law or two series of liability for the same airplane.

THE COURT: Both defense motions are in the nature of a motion to dismiss for summary judgment?

MR. MCKELVEY: Yes, your Honor.

THE COURT: There's no motion as there was in California to bring it here, there's no—I thought I saw something here of a motion to transfer still open, was it or not?

MR. MCKELVEY: We will concede, your Honor, Piper and

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Hartzell, that is if this Court dismisses it, we will accept service in Scotland and will defend the case in Scotland. The statute of limitations in Scotland does not expire until July of 1979.

MR. SCOTT: We have agreed to that, sir.

MR. MCKELVEY: The cases relied on—and I won't take up much more of your time—

THE COURT: I haven't read your briefs, obviously. This was Judge Muir's case and I had to recuse myself in a couple of other cases in which I was closely connected

with officers of one of the parties and in return this was assigned to me from him. And I have not gotten into it. This is a '77 case so I will have to read the briefs and get onto it as soon as I can.

MR. MCKELVEY: One final paragraph: The cases upon which plaintiffs rely are California cases, Reich versus Purcell, Hurtado and Harrah's Club and are appended to the memorandum of law submitted by plaintiffs' counsel.

Hurtado involved a Mexican citizen but the automobile accident occurred in Sacramento County, California. Harrah's Club is a dram shop case. The Harrah's Club is a gambling casino in Nevada advertised in California for Californians to come to Nevada and patronize Harrah's club. The defendants did—not the defendants—but two Californians did and became obviously intoxicated. Harrah's continued to serve them liquor

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and these people got back on the road and got back to California and were involved in a serious accident. Plaintiffs brought suit against Harrah's Club claiming that California should apply its dram shop act because the accident happened on the California highway. And the court said yes, apply California law in that case rather than Nevada which forbade it.

The third case, Reich versus Purcell, involved an accident which occurred in Missouri. The defendant lived in California, the plaintiff lived in Ohio. California didn't apply California law in that case, it applied the law of Ohio.

In this situation here we feel that California would apply the law of Scotland. The interests are in Scotland, the people live in Scotland, the decedents, the estates are being administered in Scotland. The accident happened

there, the witnesses are there, the necessary parties to this lawsuit are there.

We can't bring in—Mr. Scott went over this and I won't go over it all again—but we have Scotch airspace, the regulation of commercial charter aircraft, all of these are Scotch interests. The only thing against Piper, the airplane was built here ten years ago. And if this airplane were manufactured in Scotland, the plaintiffs would have to prove negligence to recover against the aircraft manufacturer.

Pennsylvania's interest here in this day and age when our jobs are being lost because of imports from Japan and

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Germany and overseas nations, Pennsylvania's interest here should be to prevent somebody from a country which requires proof of negligence to recover from coming here where there's an easier standard of proof because in the long run it makes it more expensive for the person here in Pennsylvania to do business. And eventually those jobs are lost overseas. And I think it is a compelling interest of Pennsylvania in this case where the interests, with the peculiar facts of this case to apply the laws of Scotland as far as liability is concerned.

With that I will close, your Honor.

THE COURT: All right, now let me hear from the plaintiffs.

MR. MOORHEAD: Thank you, your Honor and I would like to thank you for admitting me to appear in this case.

Your Honor, this is a forum non conveniens motion basically. They are seeking to dismiss this case, move it to Scotland based on the convenience of witnesses in the ends of justice.

Let me just stress two points before I get into it. What is the legal basis for them to succeed in such a motion, what do they have to do? They have to show that the balance is strongly in their favor, not equal, not a little bit more than equal, but strongly in their favor.

I'm going to show—I hope I show, I hope I have already shown in my papers—but I hope to just cover them

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briefly in oral argument that each and every element that they have raised that say kick this case out of their chosen forum—which is something I want to go into also. They chose this forum, we didn't. They chose Pennsylvania. But they say kick this case out of our chosen forum for the second—or if you want to say for the third time let's transfer this case to Scotland. And each and every element that they raise to transfer this case, the equities, I would say, are overwhelmingly in favor of keeping it here. Or at least if not overwhelming, they are equal, to keeping it here.

And again, what is the standard? It must be strongly in favor of the defendant. Or to put it in the words of a case that the defendants understandably have omitted to cite, this is the case of Top Form Mills versus Sociedad Nationale wherein the court states: There has been no allegation that Top Form has chosen to bring suit in the Southern District of New York in order to vex, harass or oppress the defendant and this court finds that no such motive exists. As has been noted, we should respect plaintiff's choice of forum as long as no harassment is intended, especially when the alternative forum is a foreign one.

It is thus evident that Avandero has not met its burden of showing positive evidence of unusually extreme

circumstances that material injustice is manifest and its motion must be denied.

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I'm saying they haven't met that standard and I would go in now and discuss it. First off, as to the statement of facts, I am not going to go into a detailed statement of facts, Mr. Scott covered it very well. Save and except one important procedural point that they understandably glossed over, both defendants.

And that is that they requested this case be transferred from California to Pennsylvania. They themselves requested the transfer. And in that request, let me just read to the Court some of the things they said requesting it to be sent here. Piper made this statement: The propriety of transferring the within action to Pennsylvania for the convenience of witnesses appears to overwhelm other factors in view of the apparent theories of liability as against the defendants. The material charging allegations of plaintiffs' complaint concern defective products and negligent manufacture, assembly and design. As attached reader affidavit indicates, the subject aircraft was manufactured in Pennsylvania and sold to a corporation in Ohio. Necessarily, it would seem that all material witnesses on the liability issues reside either in Pennsylvania or Ohio.

Convenience of the witnesses is furthered by considering the fact that discovery will necessarily have to take place largely within the state of Pennsylvania.

That's not us talking, your Honor, that is Piper talking, that is Piper talking in the original transfer motion.

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They continue on and cite a case again supporting their position to move it to this Court.

That case is Quandt versus Beech Aircraft Corporation, 317 Fed. Supp. 1009. The transferring court held that action by foreign citizens arising from an air crash in a foreign state favored on balance the transfer of the action to the place where the defendant manufacturer maintained its principal office and manufacturing facility.

Where is that? That's here in Pennsylvania. Now Hartzell in the same proceeding—

THE COURT: Now you say that the motions here and what you are arguing are the motions of the two defendants for a change of jurisdiction. Are you saying that's basically what they are asking for, but in that motion they asked for the case to be dismissed or judgment on the pleadings, that's what I understood.

MR. MOORHEAD: They asked I assume for it to be dismissed in favor of bringing it in Scotland.

THE COURT: All right, I haven't checked the motions yet.

MR. MOORHEAD: And they brought the same motion in California, sending it here. And that's my point. I will read further but one of our primary contentions is that they should be estopped from basically transferring this case again. It was removed from state court, federal court in California. It

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was removed at their request pursuant to 1404a from the United States District Court in the Southern District of California to this Court. And they are seeking again, okay, we have done it twice, let's do it again and send it over to Scotland.

I hesitate to think where we will go if we get to Scotland.

Let me just read to you some statements made by the defendant Hartzell in its original motion to transfer to this Court. Hartzell's original motion states: To transfer said action to the United States District Court of Pennsylvania for the convenience of all parties and all witnesses in the interest of justice.

THE COURT: How did this case get started in California, as a matter of interest. What contacts are there of anybody in California?

MR. MOORHEAD: We sincerely felt, your Honor, that all defendants, Avco Lycoming, Hartzell and Piper had sufficient contacts—more than sufficient contacts—to justify a suit in California. Unfortunately, the court in California decided as to Hartzell which was another point I want to state that they were not doing sufficient contacts there that the case—the court in California did not dismiss the action which is a fundamental flaw in their argument that California choice of law does not apply.

The action, if you will read the order, was not

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dismissed. The court declines to dismiss the action as to said defendant Hartzell—this is from this order, page two. In view of its order hereinafter set forth for transferring the action to the Middle District of Pennsylvania.

The action was not dismissed in California—which is very important. I will read into why California choice of rule—choice of law rules pursuant to Van Dusen must apply here.

At any rate, I won't belabor this. I included statements of both defendants ad nauseam. I included statements of both defendants ad nauseam in my reply paper saying why they wanted this case moved here. They went on and on about the ends of justice would be served if it

is here. The convenience of witnesses would be served if it is here. They all said that, we didn't. This was in California.

Let me go on and address the instant motion. We are here at their request and now they want to send us over to Scotland. Let me just address the point that they have raised in their motions.

Again, the balance of factors has to be strongly in favor of the transfer. And I would just invite you to keep a score card, to keep a tabulation going on the elements as dictated in Gulf Oil case as to what is necessary for the defendants to satisfy their very heavy burden to transfer a case, particularly to a foreign jurisdiction which this would involve.

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The convenience of witnesses. Both defendants have harped away that the majority of the witnesses are over in Scotland. Number one, this argument totally ignores their original statements where they say the majority of the witnesses required on liability issues are in Pennsylvania and of course Ohio, namely the people who planned the various products that we allege are defective, the people who designed those products, the people who manufactured those products, the people who installed those products originally. The list as far as in person witnesses is huge.

Now you take a look at the documentary evidence that is going to have to be produced. Where is it going to come from as to the defects we allege existed in this aircraft and proximately caused the crash. It is going to come from Pennsylvania and Ohio, not from Scotland.

Let me go on. They continue to harp also on the fact that all the witnesses on damages are in Scotland and that therefore it is unfair. That omits a very basic point.

The witnesses that are on damages in this case are the plaintiffs and they have chosen this forum over Scotland to bring their action. So they are more than willing, by bringing the action here, to come here, so they cannot complain. And in fact, it is not true that it would be inconvenient for the plaintiffs who are the only witnesses on damages to come to Pennsylvania. It is simply not the facts. They are willing to come here because they have

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brought the action here or had it transferred here without objection.

So you have the primary witnesses on liability. And you have the primary witnesses on damages. Where are they? They are in Pennsylvania or more than willing to come to Pennsylvania.

Let's backtrack a little bit and take a look at the thrust of what the plaintiffs are contending here. The plaintiffs are contending that there was a defect existing in this aircraft. The case has not proceeded far enough to determine the exact nature, extent or all the elements of the defects that we contend caused this crash. But the point is that where was the defect designed? Where was the defect installed? Where did all the elements constituting the factor that caused the damages in this case take place? Right here in Pennsylvania or in Ohio.

So as you can see, the balance on witnesses, at least the first element if at anything is even, I submit that it is clearly in favor of the plaintiffs, but at least it's even. It is not strongly in favor of the defendants, which is the burden they have to hold to transfer this case to Scotland.

Next, they make a big point that it is inconvenient for this action to be tried here because foreign law will have to be applied and that is the law of Scotland. The

law of Scotland does not govern any issue in this case. Whether you take the conflicts law of California which we submit clearly

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must apply under Van Dusen versus Barrack or even concede, let's take the law of Pennsylvania or let's take the law of Ohio. The conflicts law that is going to apply is basically governmental interests. It may have significant contacts but as the court in Pennsylvania in Griffin versus United Airlines says even under significant contacts we still must look to government interests.

So what states are interested in applying their law to that action? If you read the brief that we filed and the analysis under governmental interests, Scotland has no interest in applying its law. Number one, its damage provisions under its law are limited. Well, would it have an interest in applying its limited damages provision to its own citizens? No.

Scotland obviously wants its citizens to obtain the greatest recovery possible. How will that happen? Through the law of Pennsylvania as opposed to that of Scotland. Now we look at the other side. We have covered damages. What about liability? What is the law of liability in Scotland as it applies to product liability? There's none.

As the defendants have already said—and I concede —the only law involving products cases in Scotland is negligence. There is no strict product liability. So the interest in a state in enacting strict product liability is to protect its own industries—or excuse me—the interest in a state not in

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enacting strict product liability laws is to protect its industries from this rather onerous burden. But are the

industries which we allege caused this crash in Scotland? No, they are not. They are here in Pennsylvania and Ohio.

So does Scotland have any interest in applying either its law of damages or its law of liability? It does not.

Let me go on because I think this will link in a second point. Both counsel have commented that this jurisdiction has no interest whatsoever in this action. That's really absurd as far as I understand it any way. Where was the defect created in this aircraft? It was created right here in Pennsylvania. The defect in design and manufacture of this aircraft as alleged by plaintiffs was created right here. It happened right here. True, the propeller was manufactured in Ohio but it came to Pennsylvania and was put in the aircraft in Pennsylvania.

So as opposed to Scottish law, Pennsylvania law, the defect occurred here and so therefore this community has a very strong interest in preventing such defects from occurring in its industries which manufacture these products.

A final point on that issue, this community has no interest. I submit this community as a whole, Pennsylvania, has a strong interest aside from making its manufacturers not produce defective products. And that is let's say we are successful in this lawsuit, what is going to happen? Industries in Ohio and Pennsylvania hopefully are going to be assessed a rather

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damage award. But let's say we are unsuccessful, the same thing. Industries in Pennsylvania and Ohio are not going to be assessed a very large damage award. The arguments for these people who live in these communities right near these manufacturing plants is obvious. If their manufacturing plants are continually hit with large damage awards, they may go out of business. If they are not

hit with large damage awards, their jobs will remain secure. That is just a digression to show that the community as a whole that we are presented with here in and around this Court is definitely interested in this litigation.

But the defendants have also hit strongly on the point that they cannot join parties that will be necessary to this action in Pennsylvania. And they say the harm that will result from this action is that they will be forced to bring a second action in Scotland for indemnity.

Again, we are looking at the balance here. First off, what if this action is tried in Scotland, what are the plaintiffs going to have to do if they win? They are going to have to come back to the courts of the United States and ask those courts to: One, recognize the judgment and then get a judgment on that judgment in a federal court that can be enforced.

So what are we going to do if it is kicked back and forth for the third and fourth times from Scotland. The point is that we are going to have to bring a lawsuit. So the equities

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on that point again are even, they are not strongly in favor of the defendants. Just as I said before, the interests in this community in hearing this lawsuit are not strongly in favor of the defendants.

Secondly, I would like to just read a portion of the investigative report that was referred to by counsel for the defendant.

MR. SCOTT: Your Honor, if I might object, there is no final investigative report. There is only a provisional report that is under review at this point. Many of the conclusions that were reached by the investigators verge on the inane. And only a few facts which were clear in

their investigation were cited by me. The conclusions I believe should not be brought out at this point.

THE COURT: You may go ahead.

MR. MOORHEAD: It is understandable why counsel for the defendant would say this in light of this conclusion that I am going to read to you from the accident investigation report conducted by the British authorities. At this time I cannot see any technical evidence likely to be sufficient to sustain a damages claim against the owners or operators of the aircraft or their staff.

Now, in their papers and in their oral argument, the defendants say we must bring in these owners, we must bring in the maintainers, we must bring in their staff and we must bring

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in the investigators, we want to bring them into this lawsuit. The point is, I doubt very much if they are going to really want to bring them in because of this opinion.

Let me read on to just another portion of their conclusion: There is, however, one aspect of this tragic happening that I feel warrants detailed scrutiny is the apparent major discrepancy between the single engine performance of this type of aircraft and its stalling characteristics in various configurations either stated or implied in the then current flight manual. This manual having the approval of both the United States of America, federal aviation authorities of its country of origin and the British government civil aviation authority acceptance and approval for mandatory use within the British registered aircraft.

He goes on to criticize that particular point in this aircraft. What I am saying, your Honor, is that all of these witnesses they contend should be called here and

create the inconvenience, I believe in reality will never be called here to trial. Possibly to depositions which can be as easily taken over there as here.

The defendants also bring in the point under Gulf Oil —they didn't in oral argument but they did in writing so I will address it—the site of the crash is important here. I'm sure counsel for defense and your Honor has heard many more aviation cases than I have tried. But I don't believe that the

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view of the premises is at all relevant here. We have alleged a defect in the aircraft, the terrain, the amount of ground cover or whatever that existed at the time of this crash is irrelevant to the issues presented in this case.

So your Honor, I will come back in closing now to what I believe are numerous red herrings that have been thrown into this case. As the defendants recognized in their original motion to transfer this case at their own choosing from California to this Court, this is a products liability action which alleges defects in design and manufacture of an aircraft which was built here and in Ohio.

The nature of the case is concerned solely with the existence of these defects. And under product liability law did these defects exist at the time of manufacture and did these defects proximately cause the crash. The overwhelming number of witnesses to establish a defect exist in Pennsylvania and Ohio. They do not exist in Scotland.

The overwhelming and as a matter of fact all of the witnesses as to damages are willing to come to Pennsylvania. So as to witnesses, they have not handled their burden of making it strongly in favor of a transfer to Scotland.

As to a view of the scene, they have not substantiated their burden. As to a joinder of parties, they have not

substantiated their burden. As to foreign law being applied, it is clear that either the law of California choice of law rules

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apply or Pennsylvania or Ohio. And under all those choice of law rules, Pennsylvania law is going to apply on the basis of governmental interest.

This case definitely has a direct relationship to this community and should be tried here because the manufacturers are either here or in very close proximity.

Finally, your Honor, I cannot minimize the point—and I hope you pay particular attention to this statement that I have I think in our papers made by both the defendant Hartzell and Piper saying that fine, Pennsylvania is fine with us. For the convenience of witnesses it's better here, for the ends of justice it's better here. And then we get it moved here and what happens? No, the convenience of witnesses, it's better in Scotland. The ends of justice is better in Scotland.

I submit, your Honor, that they should at least be estopped to have this case tried in a forum that they themselves chose. And in conclusion, your Honor, I submit that all of the factual, legal and practical requirements for a just and valid cause of action can be maintained in Pennsylvania and through these moving papers have been shown to be able to be maintained in Pennsylvania.

Furthermore and most importantly, the defendants have simply not substantiated their burden to transfer this case to a foreign jurisdiction in Scotland. They make the contention that Pennsylvania was not your original chosen forum and therefore

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you cannot rely on all the cases that say that extreme emphasis should be applied to a plaintiff's chosen forum. I

submit, your Honor, that the United States of America was the plaintiffs' chosen forum and wherever, even the jurisdiction that they themselves chose, we much prefer this jurisdiction over Scotland.

Thank you very much.

MR. SCOTT: Your Honor, I would like to reintroduce myself. I'm Ronald Scott, I represent Hartzell Propeller, Inc. I am not "they". And this "they" did not choose Pennsylvania. This "they" had an alternative motion to get out of California, if somehow we should be found there. That motion wasn't reached. It never took effect because we were found not to be there. And that's very important.

We didn't choose Pennsylvania. We are not here because we selected Pennsylvania as a forum. We didn't. We weren't even there. We can't be estopped. Your Honor recognizes that argument.

The majority of the witnesses. If I were willing to be limited in trial of this case to the witnesses chosen by the plaintiff which plaintiff wished to bring to the United States, plaintiffs' statements would be absolutely correct and I would agree with that. But I'm not. I think I'm entitled to present witnesses other than those that plaintiff chooses for me on issues of damages.

And where am I going to get them and how am I going to

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get them over here and how am I going to compel their testimony? How am I going to get the employers of the plaintiffs' decedents to testify against the widow or the orphan or whatever. How am I going to compel them to cross the ocean to tell a different story than plaintiff wants heard? How can I do that? I can't.

How can I compel the testimony of the mechanic, whereever he is, bless his heart, who loosened up those four nuts and caused this accident. How can I do that? Simply because the British Department of Trade was so slipshod in its investigation as to not go to the accident source, the airport from which the aircraft took off and interview the people who did the work, doesn't mean that we should be forbidden to do so or forbidden to join them as parties if after a proper investigation we can find who they are.

They are the most obvious defendants. The coincidence of having all four mounting nuts come loose simultaneously in the same amount, it was better than 200 hours after the log book—the last log book entry of work on that propeller. The coincidence of those four coming loose simultaneously is incredible. A computer would blow a fuse trying to compute it. The only conceivable way that could have happened was through a mechanic's error.

The plaintiff says he's going to have to bring a lawsuit in the United States if he wins in Scotland. Not if he wins against the proper defendant. The proper defendant is

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already over there. And if we appear and if we are found guilty over in Scotland of having been negligent, if we are responsible, I can't see any difference between transferring a judgment from there to here than transferring a judgment from Pennsylvania to Ohio. Still it's going to be transferred if he's going to have to enforce it against the corporation directly.

He has tried too many cases to know that to be so and your Honor has too.

Scotland he says has no interest—I'll paraphrase him —in even handed justice for its citizens. And I think

that's crazy. Scotland has a great deal of interest as does Pennsylvania in seeing that all of its citizens get the same justice, that no one is preferred because of a fluke. And a fluke is what it would be if this were brought in the United States with everything having happened over in Scotland. Witnesses on liability. I found the argument incredible.

Of course, no matter where the action is brought, depositions in Piqua, Ohio, and in Lock Haven, Pennsylvania, will be taken. That's the mill running in the product liability litigation. But that's by no means all. He makes the assumption that the cause of this accident was the cause that the investigators with the assistance of someone over there on behalf of the plaintiff came up with is in fact the cause. It isn't.

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The cause is quite different. I myself ran a flight test on a similar aircraft. I don't represent Piper. At some time later on I might be punching it out on the other side from Piper. But I ran a flight test on PA 23 250 and I certainly didn't find the results that the Board of Trade investigators found. I found it to fly up to its specifications. I think quite the opposite, everything points to this case being out of Pennsylvania, out of the United States, in Scotland. That's the only place where the plaintiffs could get the even handed treatment that they are entitled to as Scottish citizens rather than preferential treatment that plaintiffs' attorneys would be trying to get.

Thank you.

THE COURT: Thank you. I will take it under advisement. Adjourn Court.

(Whereupon the hearing was concluded.)

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AFFIDAVIT OF DANIEL C. CATHCART IN OPPOSITION TO THE SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FILED BY HARTZELL PROPELLER, INC.

Filed December 4, 1978

[caption omitted in printing]

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

DANIEL C. CATHCART, being first duly sworn, deposes and says:

I am a member of the firm of Magana, Cathcart & McCarthy which firm represents the plaintiff in the above entitled action. This Affidavit is filed in opposition to the defendant HARTZELL PROPELLER, INC.'s Supplemental Brief in Support of Motion to Dismiss. Said brief, as filed and served upon Affiant, contains as Exhibit "A" a copy of a Summons and Complaint arising out of the accident which is the subject matter of this litigation, said Summons and Complaint having been filed in the courts of Scotland. Defendant HARTZELL has urged this Court to construe the attached pleading as evidence that the within action should not be maintained within the United States. Such a construction is unfounded and not inconsistent with the position taken by plaintiff in this action. Suit was filed in Scotland against the owners, operators and maintainers of the Piper aircraft involved in the accident. It was necessary as lawyers to file such an action before the statute of limitations would run in Scotland since this Honorable Court has not yet determined whether or not the real parties in interest may maintain this action in the courts of the United States. It will be noted that the suit in Scotland was brought on the eve of the second anniversary of the accident. It is believed by your Affiant that the statute

of limitations in such actions in Scotland is two years. The parties have no desire to pursue the within action in Scotland and merely had it filed because of the pending running of the statute of limitations and the question of jurisdiction and/or forum non conveniens remaining unresolved here in the United States.

The investigation conducted by representatives of the plaintiff fails to disclose that the operators or maintainers were necessary or desirable parties defendant. To the contrary, the theory of liability as against the defendants before this Court are predicated on the usual products liability theories and are unrelated to any maintenance items. We are dealing with defects claimed to have existed at the time of manufacture related to the design and construction of the propeller assembly, including propeller governor and the single engine handling qualities and characteristics of the Piper aircraft involved. The design, construction and certification of the subject aircraft took place within the jurisdiction of this Court. A more convenient forum for the prosecution of such an action does not exist. To the extent that there is any negligent maintenance or intervening cause, the defendant can certainly obtain this information by way of discovery in England and Scotland. It is clear, however, under the principles of joint and several liability, that any negligence in the maintenance or operation of the aircraft does not diminish the defendant's liability as manufacturers.

WHEREFORE, your Affiant respectfully prays for an Order denying the defendant's motion to dismiss.

Respectfully submitted,

/s/ DANIEL C. CATHCART
Daniel C. Cathcart

[jurat omitted in printing]
[certificate of service omitted in printing]

EXHIBIT "A" TO SUPPLEMENTAL MEMORANDUM OF HARTZELL PROPELLER, INC. IN SUPPORT OF MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS

Filed February 5, 1979
[caption omitted in printing]

Exhibit "A"

OPINION FOR HARTZELL PROPELLERS INC.

Article 4 of the Carriage by Air (Application of Provisions) Order 1967 provides that Schedule 1 of the Order shall have effect in respect of carriage which is not international carriage as defined in Schedule 2. In my opinion the flight which was investigated at the recent Review Board hearing was one to which Article 4 of the 1967 Order applied.

Article 6 of the 1967 Order provides that, among other sections, Section 5 of the Carriage by Air Act, 1961 shall apply to carriage to which the Order applies. Section 5(1) of the 1961 Act is in the following terms: "No action against a carrier's servant or agent which arises out of damage to which the Convention relates shall, if he was acting within the scope of his employment be brought after more than two years, reckoned . . . from the date on which the Aircraft ought to have arrived. . . ."

Article 29(1) of the 1967 Order is in the following terms: "The right to damages shall be extinguished if an action is not brought within two years, reckoned from . . . the date on which the Aircraft ought to have arrived."

I am not concerned about the incorporation of Section 5(1) of the 1961 Act into the 1967 Order. An action

was raised within two years against the pilot's representatives in Scotland. If it had not been, I consider that it would have been open to the pilot's representatives to waive the application of Section 5(1) on the ground that it purports to extinguish the remedy rather than the right.

Article 29(1) of the 1967 Order is in a different position. Had an action not been raised within two years against the carriers I am of opinion that any right to recover damages from them would have been extinguished. Also there could have been no question of waiving the provisions of Article 29(1). I refer Shawcross and Beaumont, Air Law, 4th ed'n, at para. 443 Note 9.

In my opinion the provisions referred to have no bearing on Hartzell's position. Hartzell were not the carriers. Hartzell are sued in the Court of the Middle District of Pennsylvania on the ground that a defect in the propeller caused or contributed to the accident. Had Hartzell been a Scottish Company, and had no cause for the accident been put forward other than a defect in their product, I consider that the normal three year time bar for fatal accident cases would have applied. I refer to Section 17 of the Prescription and Limitation of Actions (Scotland) Act 1973. Hartzell are minded to apply to the Court in Pennsylvania to stay or dismiss the proceedings there in return for an undertaking to submit to the jurisdiction of the Scottish Courts. Assuming that a fresh action is raised in Scotland against Hartzell prior to the third anniversary of the accident, I see no reason why that action should be held to be time barred. Similarly I see no time bar objection arising if, instead of a fresh action being raised, Hartzell are merely added as defenders to the action that was raised in Scotland by the dependents of the deceased passengers prior to the expiry of the two year period. I base my opinion upon the proposition that the 1961 Act and 1967 Order apply to actions brought

against carriers by air and their agents or servants but not to persons, such as Hartzell, who are sued as delinquents on the ground that they supplied a faulty component.

I should make clear why, if the conclusion stated in the preceding paragraph is wrong, and the 1967 Order applies to, among others, actions raised against component manufacturers, I am of opinion that Article 29(1) cannot be waived. My reason is that the effect of the Article is radical in that it extinguishes the remedy. The Court would in my view be bound to take the point. Also, for completeness, I may say that if contrary to my view, Article 29(1) applied to an action raised against Hartzell it would not be a good answer to say that an action was raised within two years against Hartzell in Pennsylvania. I anticipate that a Scottish Court would interpret the words "if an action is not brought" as referring to an action raised in Scotland. Although I do not agree with this narrow approach to interpretation, I note that in analogous circumstances it was adopted by Roskill J. in *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.* (1965) 1 Q. B. 101 at pp. 123-126.

THE OPINION OF

/s/ C. K. DAVIDSON

EDINBURGH.

12th January, 1979.

STIPULATION

Filed May 14, 1979

[caption omitted in printing]

It is hereby stipulated by and between the undersigned as counsel for all parties to this litigation that discovery may proceed in this action without prejudice to the pending Motions to Dismiss on the grounds of forum non conveniens and with the understanding that all material obtained in discovery may be used in any action instituted or to be instituted in Scotland on the same cause of action as the instant action to the extent permitted by the laws and procedural rules of the Scottish Courts.

/s/ LEE C. SWARTZ
Lee C. Swartz, Esquire,
Attorney for Plaintiff

/s/ DANIEL C. CATHCART
Daniel C. Cathcart,
Esquire,
Attorney for Plaintiff

/s/ CHARLES J. MCKELVEY
Charles J. McKelvey,
Esquire,
Attorney for Defendant,
Piper Aircraft
Corporation

/s/ RONALD C. SCOTT
Ronald C. Scott,
Esquire,
Attorney for Defendant,
Hartzell Propeller, Inc.

Approved May 14th, 1979

/s/ R. DIXON HERMAN

AFFIDAVIT OF RONALD C. SCOTT

Filed September 17, 1979

[Caption omitted in printing]

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

RONALD C. SCOTT, being first duly sworn, deposes and says:

I am attorney for Hartzell Propeller, Inc. in this matter. I have received a copy of the recent Affidavit of Daniel C. Cathcart, Esquire and file this Affidavit in response thereto.

In November and December of 1978, deponent attended and participated in a trial in Edinburgh, Scotland regarding the cause of the accident involved in this litigation. An attorney for the families of the deceased passengers also appeared in that matter. Over the course of the hearing, it came out that the pilot had been flying under conditions conducive to mountain wave formation, in an area susceptible to mountain wave formation and at altitudes in violation of his own employer's regulations. At the same hearing it was determined as a matter of fact that there was insufficient evidence of any defect in the aircraft or its equipment, that the flight was a commercial flight, and that the investigators, in failing to ascribe error on the part of the pilot, were being "too naive." The essence of the findings, by which plaintiffs are collaterally estopped, is that there was no defect on the airplane or its equipment shown to be causally related to this accident.

Counsel for plaintiff argues that this action is a products liability action. It is not. It is a lawsuit allegedly to recover damages for the estates and survivors

of decedents. The plaintiff's present theory, which defendant contends is barred by the findings in Scotland, is that there was some product connection with the accident. A different theory is asserted in the actions in Scotland which do not name these defendants and name only the owner, operator and pilot of the aircraft.

Counsel for plaintiff says "always in the past, U. S. aircraft manufacturers have been amenable to suit for personal injuries and wrongful death in the Federal Courts of the United States, including actions brought in this country by aliens." Without citations, Mr. Cathcart refers to various actions and insists that there is no precedent for our proposition in the Motion to Dismiss. In so doing, he ignores not only all of the cases cited in Hartzell's Brief and Supplemental Brief, but also the two most recent decisions on the issue, one of which is from Mr. Cathcart's home jurisdiction, California. The California decision, *Hemmelgarn v. The Boeing Company, et al*, 15 Aviation Law Reporter 17,575 is attached hereto for the Court's assistance. The most recent case does not appear to have been printed in official publications yet; but attached is a summary of the case from Product Liability Reporter. When the case is reported, deponent will supplement this memorandum with an official citation.

Defendant Hartzell does, however, join counsel for plaintiff in urging a prompt dismissal of the action in order that it can be reinstituted and processed in Scotland while witnesses and evidence are still available.

/s/ RONALD C. SCOTT
Ronald C. Scott

[juriat omitted in printing]
[certificate of service omitted in printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES McDOUGALL STORM, DAVID VINCENT MORAN and PETER CUNNINGHAM SCOTT,

Plaintiffs

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE DIVISION, a Division of Avco Corporation; HARTZELL PROPELLER, INC., a corporation,

Defendants

MEMORANDUM

This action arises out of an airplane crash near Tulla, Scotland on July 27, 1976 in which all persons aboard were killed. The Plaintiff, Gaynell Reyno, instituted this suit as the personal representative of five decedents, William Fehilly, Liam Stuart Fehilly, William James McDougal Strom, David Vincent Moran, and Peter Cunningham Scott. Gaynell Reyno seeks general damages for the heirs and next of kin of the above decedents and damages for funeral and burial expenses in this suit styled as one for wrongful death on the basis of products liability and negligence theories. The remaining Defendants, Piper Aircraft

Company and Hartzell Propeller, Inc., were the manufacturers of the aircraft and propeller respectively. A number of motions are presently before the court, a motion to dismiss filed by Defendant Hartzell Propeller, a motion for judgment on the pleadings or for summary judgment filed by Piper Aircraft, and two motions to strike a responsive brief filed by the Plaintiff. After reviewing the extensive materials submitted by all parties, we have concluded that this action must be dismissed on the ground of *forum non conveniens.* This dismissal will be conditioned on the Defendants abiding by their stipulation to submit to the jurisdiction of the courts of Scotland and their waiver of the Scottish statute of limitations.

Several issues were raised by the motions of the Defendants. Other than their main argument that the action should be dismissed under the doctrine of *forum non conveniens,* the Defendants also asserted that under applicable choice of laws rules that the law of Scotland would control this action and that pursuant to Scottish law, the Plaintiff neither has standing nor a right to proceed under the theory of strict tort liability. This question of the applicable law is interrelated with the analysis for *forum non conveniens* and because of our decision that the Defendants have shown overwhelming reasons for dismissal under this doctrine, we need not directly confront the standing and liability issues. The Plaintiff has also raised the question of estoppel which we have found to be unpersuasive.

Our primary attention therefore is focused on the factors applicable to the doctrine of *forum non conveniens* and the question whether we should exercise jurisdiction over this action brought by reason of an aircraft accident in Scotland, in which Scottish citizens who were passengers and a Scottish pilot, acting in the course of his employment with a Scottish Air Service, were killed while flying in Scottish airspace and when all decedents' survivors, the

real parties in interest, are citizens and residents of Scotland and more particularly, when the only contact with Pennsylvania is that it was the site of the manufacture of the airplane involved in this litigation, not the propeller which was manufactured and designed in Ohio, over seven years prior to the date of the fatal accident. Too much has happened from the date the airplane left the plant of Piper Aircraft, which goes to the heart of the question of liability, that the contact with this forum with respect to this action can at best be described as plainly insignificant.

The procedural history of this case is important to our decision of dismissal. The action was instituted by Plaintiff Reyno in the Superior Court of the state of California for the county of Los Angeles in July of 1977. After being removed to federal court in August of that year, Defendant Hartzell filed a motion to dismiss the action for lack of personal jurisdiction or in the alternative to transfer the action pursuant to 28 U. S. C. § 1404(a). Defendant Piper then joined in Defendants Hartzell's motion to transfer the action on November 23, 1977. The District Court entered an order on December 21, 1977 granting Defendant Hartzell's motion to quash service of process and granting the motion to transfer this action to the United States District Court for the Middle District of Pennsylvania. The quashing of service of process to Hartzell was based on due process considerations set forth in *International Shoe Company v. Washington*, 326 U. S. 310 (1945). The court did not dismiss the action against Defendant Hartzell since valid service against it was possible in the Middle District of Pennsylvania. The importance of the transfer of the action and the quashing of service against Hartzell lies in the applicable choice of laws rule that is relevant to each Defendant under rules of *Van Dusen v. Barrack*, 376 U. S. 612 (1964) and *Klaxon Co. v. Stenor Electric Manufacturing*, 313 U. S. 481 (1944).

The facts as noted center on the crash of an aircraft on July 27, 1976 in which the pilot and all passengers were killed in the navigable air space near Tulla, Scotland. The aircraft involved in the accident was a Piper Model TA-23 bearing British registration mark G-AYSF which was manufactured by Defendant Piper at Lock Haven, Pennsylvania. The plane's propeller was designed and manufactured by Defendant Hartzell Propeller, Inc. in Ohio. The aircraft was being piloted at the time of the accident by a Scottish citizen and resident, over mountainous terrain in southern Scotland. Subsequent to the manufacture of the aircraft involved in this accident it was sold and delivered to a purchaser in Ohio for use in the United States. By a chain of events, apparently still unknown to the Defendants, the plane came to be owned and operated by a Scottish air-taxy company in Scotland and the British Isles. The plane was owned, operated, maintained, and serviced by the Scottish owner for several years preceding the accident of July 27, 1976. The British Department of Trade Investigation investigated the accident shortly after its occurrence. Presently, what remains of the wreckage is in the possession of the British Department of Trade Investigation.

The Plaintiff, Gaynell Reyno instituted this action as the personal representative of the estates of five of the decedents. All of these decedents were citizens and residents of the country of Scotland. Also, all heirs and next of kin, and all those persons entitled to recover by virtue of the deaths of the passengers, (if any recovery is decreed), are citizens and residents of the country of Scotland. Plaintiff Reyno is a citizen and resident of California and is not related to the decedents.

The Defendants assert that the accident was due to pilot error or improper maintenance and servicing of the aircraft and in this respect have stated their desire and

inability to join the operating company by whom the pilot was employed, the pilot's estate, and the owner and maintainer of the aircraft. A lawsuit has been brought before the courts of Scotland naming as defendants the operating company, McDonald Aviation, Ltd., the owner of the plane, Air Navigation and Trading Company, Ltd., the executor of the pilot's estate, and the Civil Aviation Authority. Also an action was commenced in the courts of Great Britain against Piper Aircraft and Hartzell Propellers along with MacDonald Aviation and Air Navigation and Trading Company by a personal representative of the sixth passenger in the aircraft at the time of the accident, the only passenger not represented by Gaynell Reyno in the instant action. Therefore at least one action is pending before the courts in the United Kingdom against the present Defendants and other involved parties.

We now begin with a discussion of the factors that we believe substantially point to the dismissal of this action under the doctrine of *forum non conveniens.* We have the inherent power to refuse jurisdiction over a case such as this one where the interests of justice require that the suit be brought in a foreign country. *Gulf Oil Corporation v. Gilbert,* 330 U. S. 501 (1947); *DeMateos v. Texaco, Inc.,* 562 F. 2d 895 (3d Cir. 1977), *cert. denied,* 435 U. S. 904 (1978); *Fitzgerald v. Texaco, Inc.,* 521 F. 2d 448 (2d Cir. 1975) *cert. denied,* 423 U. S. 1052 (1976); *Dahl v. United Technologies Corporation,* 472 F. Supp. 696 (D. Del. 1979).

The general factors that we must consider in determining whether to dismiss an action for *forum non conveniens* were set forth by the Supreme Court in *Gulf Oil Corporation v. Gilbert,* 330 U. S. 501 (1947). Mr. Justice Jackson enumerated in that decision numerous private and public interests that should be considered under the doctrine. The factors pertaining to the private interests of

the litigants are the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive" *Id.* at 508. The public factors bearing on the question include the administrative difficulties flowing from court congestion, an interest in having local controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the Court, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509.

The above cited factors have generally been followed by all courts presented with the issue of whether a case should be dismissed because a foreigner forum is the more convenient one. *See, e.g., DeMateos v. Texaco, Inc.*, 562 F. 2d 895, 899 (3d Cir. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 450-51 (2d Cir. 1975); *J. F. Pritchard and Co. v. Dow Chemical of Canada*, 462 F. 2d 998, 1000 (8th Cir. 1972); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499, 501-02 (2d Cir. 1966); *Dahl v. United Technologies Corporation*, 472 F. Supp. 696, 699 (D. Del. 1979); *Top Form Mills v. Sociedad Nationale Industria*, 428 F. Supp. 1237, 1252-53 (S. D. N. Y. 1977); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 26-27 (N. D. Ohio 1977); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S. A.*, 437 F. Supp. 331, 332 (S. D. N. Y.); *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 923 (S. D. N. Y. 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 814-13 (S. D. N. Y. 1972); *McCarthy v. Canadian National Railways*, 322 F. Supp.

1197, 1199 (D. Mass. 1971); *Olympic Corporation v. Societe Generale*, 333 F. Supp. 121, 123-24 (S. D. N. Y. 1971). We have carefully read each of the above cited decisions and in light of these decisions and their analysis of the Gulf Oil factors, it is clear that it would be no less than an abuse of our discretion if we did not dismiss this action on *forum non conveniens* grounds as the Gulf Oil criteria overwhelmingly point to dismissal.

The first factor that we must consider is whether an alternative forum is open to the Plaintiff if this motion is dismissed. Generally, it has been stated by the courts that the doctrine of *forum non conveniens* presupposes that an alternative more appropriate and convenient forum is available. *See, e.g., DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1006 (D. S. C. 1978), *Texaco Trinidad v. Astro Exito Navegacion S. A.*, 439 F. Supp. 331, 332 (S. D. N. Y. 1977); *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 915 (S. D. N. Y. 1977). This principle is taken from the Gulf Oil decision in which it is stated "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process. . . ." *Gulf Oil* at 506-07. In the instant motion the Defendants have consented to submit to the jurisdiction of the Scottish courts of law and we have noted our intention of conditioning the dismissal of this action on their submission to the jurisdiction of such courts and their waiver of any statute of limitation. Plaintiff has an alternative forum available to her and in fact a case is proceeding in the foreign courts already.

Next, we turn to the important factor of Plaintiff's choice of forum. As stated in *Gulf Oil*, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" *Id.* at 508. Here the Plaintiff's first choice was the California state

Superior Court. Plaintiff relies on a number of cases under 28 U. S. C. § 1404(a) in which the Plaintiffs were American citizens. This case, however, does not involve section 1404(a) as the determination rests on our inherent power to dismiss and it also does not involve Americans as real parties in interest. Rather, the Plaintiff is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law.

Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States. As stated in *Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 927 (S. D. N. Y. 1977), when a case involves a "claim of a foreign plaintiff, [his] choice of forum should be given less weight than the choice of an American plaintiff. . . ." And in *Olympic Corporation v. Societe Generale*, 462 F. 2d 376, 378 (2d Cir. 1972), the court stressed that the balance of the Gulf Oil factors need not be as strong in favor of defendants when the plaintiff is not an American citizen. *See also, Olympic Corporation v. Societe Generale*, 333 F. Supp. 121, 124 (S. D. N. Y. 1971); *Michell v. General Motors Corporation*, 439 F. Supp. 24 (N. D. Ohio 1977).

Also, the plaintiff's choice of forum is generally given less weight when the forum selected is not the plaintiff's home jurisdiction. *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 451 (2d Cir. 1975); *McCarthy v. Canadian National Railways*, 322 F. Supp. 1197, 1199 (D. Mass. 1971). In this case the real parties in interest, the heirs and next of kin of William Fehilly, Liam Stuart Fehilly, William James McDougall Strom, David Vincent Moran, and Peter Scott, are not American citizens or residents, but rather,

citizens and residents of Scotland. Since the real parties in interest are not American citizens, and the forum of either California or the Middle District are not in anyway their "home" forum, this factor of plaintiff's choice of forum is entitled to little weight.

The next grouping of factors that we will weigh are the private interests of the litigants, including relative ease of access to sources of proof, availability of compulsory process, cost of obtaining willing witnesses, necessity of a view of the premises, and the site of the investigation of an accident. A review of the facts in this case illustrates that all such private interests point to Scotland as the appropriate forum for this litigation.

Nearly all events relevant to this action occurred outside of the Middle District of Pennsylvania. The only connection with this forum is the fact that the plane was manufactured here over seven years before the accident. The only contact with Plaintiff's choice of forum, California, is that Plaintiff's attorney and expert reside there. Convenience to counsel or to expert witnesses, it should be noted, is of small importance in the balancing of factors. See *Car-Freshner Corporation v. Auto Aid Manufacturing Corporation*, 438 F. Supp. 82, 85 (N. D. N. Y. 1977). The connections with Scotland are overwhelming. The accident occurred in Scotland, the real parties in interest are citizens of Scotland, the decedents were all citizens of Scotland, the investigation of the accident occurred in Scotland, the aircraft was owned, operated, and maintained by a Scottish company, the pilot was Scottish, the wreckage remains in the possession of the foreign authorities, nearly all witnesses needed for the defense of this suit are located in Scotland, and all witnesses to damages are located in Scotland.

The ease of access to proof element strongly points to dismissal of this action. First, all evidence as to damages,

both witnesses and documents, is located in Scotland. Ease of access to sources of proof of damages is an important factor in a wrongful death action. *Domingo v. States Marine Lines,* 340 F. Supp. 811, 815 (S. D. N. Y. 1972). Furthermore, nearly all witnesses necessary for the defense of this suit are located in the British Isles. For example, witnesses regarding the maintenance of the aircraft are in Great Britain, witnesses concerning the training of the pilot are located there, and witnesses relating to the investigation of the accident are in the British Isles. None of these witnesses are subject to compulsory process. Clearly, these witnesses are critical to this case and since they are located in Scotland, it would be more convenient for the witnesses and less costly for the litigants to litigate this matter in Scotland. *See, Fitzgerald v. Texaco, Inc.,* 521 F. 2d 448, 451 (2d Cir. 1975); *Dahl v. United Technologies Corporation,* 472 F. Supp. 696 (D. Del. 1979); *Domingo v. States Marine Lines,* 34 F. Supp. 811, 815 (S. D. N. Y. 1972); *Top Form Mills v. Sociedad Nationale Industria,* 428 F. Supp. 1237, 1253 (S. D. N. Y. 1977); *J. F. Pritchard & Co. v. Dow Chemical of Canada,* 462 F. 2d 998, 1002 (8th Cir. 1972); *DelRio v. Ballenger Corporation,* 391 F. Supp. 1002, 1004 (D. S. C. 1975).

Plaintiff relies on the argument that the essential elements needed for proof of her case are present in this forum since the plane was designed and manufactured here. We note that the alleged defective component part, the propeller, was designed and manufactured outside of this forum. Also the aircraft was manufactured over seven years prior to the accident and evidence of any changes in the plane located in Scotland. Even Plaintiff admits that all witnesses to damages reside in Scotland. Furthermore, we cannot accept Plaintiff's argument that the evidence going to legitimately raised defenses is irrelevant to our determination. The interests of justice require that a trial be fair to all parties, not just the Plaintiff.

While there are no doubt numerous cases that have reached this same conclusion based on fundamental fairness, we will specifically point to just two. The first case we rely on is *Michell v. General Motors Corporation*, 439 F. Supp. 24 (N. D. Ohio 1977). In *Michell* the court held that mere design and manufacture of an infant seat in Michigan was not crucial in the balancing of factors and it dismissed the suit on *forum non conveniens* grounds where the injury was to Canadian plaintiffs, involved a Canadian accident, when presentation of Canadian witnesses was necessary and could not be guaranteed in the United States. *Id.* at 25-26. All of these factors are present in the instant case and like the *Michell* court, we find the evidence relating to design in this action to be overwhelmed by the evidence needed from Scottish sources.

The second case on point on this question is *Dahl v. United Technologies Corporation*, 472 F. Supp. 696 (D. Del. 1979). *Dahl* was brought in Delaware by the personal representative of four Norwegians who died in a crash of a Norwegian owned and operated helicopter in Norwegian territorial waters against the helicopter manufacturer on the basis of design and manufacture defects. Chief Judge Latchum discussed the nearly identical factual pattern as we have here in the following manner:

> . . . a substantial amount of the testimonial evidence will come from Norwegians. Testimony from persons who knew the decedents will be relevant to the damages issue. Among the potential liability witnesses are employees of Helikopter Service AIS, employees from other firms in Norway that serviced or made installations on the helicopter, and the Norwegian government officials who investigated the accident.

Id. at 700. We think the chief judge was absolutely correct, that we must look to all evidence that is necessary

for a fair trial and in this case the place to find such evidence is Scotland.

Interrelated with the above discussion is the fact that the witnesses and other evidentiary materials that are located in Scotland are beyond the reach of compulsory process of this court. The unavailability of compulsory process to compel the attendance of witnesses necessary for a complete and fair trial has been recognized as a critical factor in the dismissal of cases for *forum non conveniens*. *See e.g., Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 451 (2d Cir. 1975); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499 (2d Cir. 1966); *Dahl v. United Technologies Corporation*, 472 F. Supp. 696, 700 (D. Del. 1979); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S.A.*, 437 F. Supp. 331 (S. D. N. Y. 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 815 (S. D. N. Y. 1972).

Finally, the absence of necessary third parties weighs heavily on our determination that the Middle District is not a suitable forum for this litigation. The Defendants have pursuasively argued that persons located in Scotland ought to be made parties to this suit. These include the pilot, the owner of the plane, and the operating company. Since the Defendants in this action cannot implead these necessary parties it would be unfair to make Piper and Hartzel proceed to trial in this forum. This inability to implead parties located in foreign countries has likewise been viewed as a critical factor by the courts. *See e.g., Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 511 (1946); *Texaco Trinidad, Inc. v. Astro Exito Navegacion S.A.*, 437 F. Supp. 331, 334 (S. D. N. Y. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 453 (2d Cir. 1975); *Fitz-*

gerald v. Westland Marine Corporation, 369 F. 2d 499, 502 (2d Cir. 1966); *Olympic Corporation v. Societe Generale*, 333 F. Supp. 121, 124 (S. D. N. Y. 1971); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 816 (S. D. N. Y. 1972). These potential defendants could be reached in Scotland and in fact they have been joined with the instant Defendants in a suit in the British Isles. Certainly it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses.

The last factor that we will discuss pertaining to the private interests is the necessity of a view. More generally, we believe this factor of Gulf Oil requires us to consider, as many courts have done, where the accident or event took place. All facts relevant to the crash are in Scotland, other than the fact that the manufacture and design of the plane occurred in the United States seven years before. If weight should be assigned to this "view" criteria, it certainly favors the Defendants. Familiarity with the topography around Tulla, Scotland and inspection of the wreakage of the plane would be aided by a trial in the British Isles where the accident occurred.

We now will look to the factors concerning the public interest which we believe even more strongly point to dismissal. These factors include court congestion, local interest in the lawsuit, court familiarity with the law that will govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the court and the unfairness of burdening citizens in an unrelated forum with jury duty. *Gulf Oil Co. v. Gilbert*, 330 U. S. 501, 507-09 (1946); *Demateos v. Texaco, Inc.*, 562 F. 2d 895, 899, n. 2 (3d Cir. 1977); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977).

Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly

complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

The law is clear that we must apply the choice of law rule of the state in which we sit, Pennsylvania. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U. S. 487 (1941). However, when a case is transferred pursuant to 28 U. S. C. § 1404(a), we then apply the choice of law rules of the state from which the case was transferred. *Van Dusen v. Barrack*, 376 U. S. 612 (1964). Thus in this case we must apply the California choice of law rules to Defendant Piper. In applying the choice of law rules of California we have three choices of law, California, Pennsylvania, and Scottish. With respect to Defendant Hartzell, the applicable law is not as easily arrived at.

Defendant Hartzell as previously noted, was found to have insufficient contact with the state of California and service was quashed. The District Court of California did not dismiss the action to Defendant Hartzell, but instead properly transferred the action to this forum. We use "properly" in the sense that the court had the power to transfer the action as to Defendant Hartzell even though service was quashed. Plaintiff argues that the Van Dusen rule applies to Hartzell as well as Defendant Piper, however, for the reasons that follow, we cannot accept this assertion.

The purpose of the Van Dusen rule was to prevent a party from obtaining a change in the law that would be applied to a case by seeking a transfer of the action. In essence, the Van Dusen Court ruled that a transfer under section 1404 should result in a change of courtrooms only, not a change in the applicable law. In the instant case the district court of California held that the law of Cali-

fornia could not apply to Defendant Hartzell because of insufficient contacts with that state. The question we are presented with is whether the Plaintiff in this action can capture the law of California under Van Dusen for transportation to this district and have it apply to Defendant Hartzell when service against Defendant Hartzell was improper in California. We hold that Plaintiff cannot accomplish this. Simply, the Plaintiff cannot take advantage of the law of California when she could not properly obtain jurisdiction over Defendant Hartzell there. Thus, to Hartzell we must apply Pennsylvania choice of law rules.

First, we will briefly discuss whether California choice of law rules requires that we apply California, Pennsylvania, or Scottish law to Defendant Piper. California courts follow the governmental interest approach in resolving conflict of law issues. *Reich v. Purcell*, 67 Cal. 2d 551, 432 P. 2d 727 (1967); *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P. 2d 666 (1974). As Plaintiff states in her brief the "governmental interest approach differs greatly from the significant contacts approach utilized in Pennsylvania." The governmental interest approach, in determining the law applicable in a California forum, applies to situations involving a foreign country and the choice between the two. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P. 2d 666 (1974). The objective of the analysis is to determine the law that most appropriately applies to the issue involved.

The governmental interest approach involves three steps of analysis. First, the applicable legal issue and law must be identified. Second, the state interest underlying the law must be determined. Third, it must then be determined if that interest would be furthered through application of the states' law to resolve the specific issues involved in the case. We intend to make no definitive ruling on what law will apply under the California gov-

ernmental interest analysis. Rather, our discussion will go only so far as to hold that either Pennsylvania or Scottish law will apply under the California choice of laws rules. We are relegated to this less that complete analysis because of our unfamiliarity with Scottish law which in itself is a factor supportive of dismissal of the action.

Areas of conflict are present between these three jurisdictions, i.e. Pennsylvania, California, and Scotland. First, Scottish law does not allow a personal representative to bring an action of this kind in Scotland. Under Scottish law, a personal representative may only bring an action for funeral expenses. Otherwise, an action of this type may be brought only by the deceased's relatives or dependents. We have previously stated that Gaynell Reyno meets neither of these requirements. Both Pennsylvania and California appear to permit such suits. Second, the law of Scotland has not adopted and does not recognize the theory of strict products liability. The only basis for liability in Scotland for the manufacturer of a defective product is negligence. In contrast, both Pennsylvania and California recognize strict liability.

What interests of the state these laws promote must be identified by reference to the interpretations of the laws by the respective forum courts. California courts have held that the states interest in creating a cause of action for wrongful death lies in governing the distribution of proceeds to beneficiaries and also the interest of deterring conduct within its borders that takes life. *Hurtado v. Superior Court*, 114 Cal. 3d 574, 522 P. 2d 666 (1974). For the purposes of this discussion we will assume that similar interests are promoted by the Pennsylvania laws. Since the accident did not occur in either Pennsylvania or California and because none of the decedents were residents of either of these states, it would appear that the application of either Pennsylvania or California law would

not further the purpose of the wrongful death laws. If the purpose of the Scottish law, permitting recovery for relatives of decedents, is similar, it would seem that its interests would be furthered by the application of the law of Scotland.

Particularly, this is true with respect to the rule of law in Scotland that only relatives or dependents of a deceased may bring an action of the type of the instant action and not a personal representative unrelated to the decedent. We, however, only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make, as we said before, any definitive ruling on the purpose of the Scottish law or thereby the choice of law. We do agree with the Plaintiff that in line with the California decisions, that the restrictions on recovery that exist in Scotland would generally not be applied in a choice of laws situation as the foreign country would likely have no interest in restricting any recovery its citizens might receive in foreign courts from foreign defendants. See, *Hurtado v. Superior Court*, 114 Cal. 3d 574, 522 P. 2d 666 (1974). We do not believe the provisions restricting suits of this nature to relatives of the decedents fall within this general principle however. Such a restriction would likely be for the purpose of insuring that suits are brought by persons interested in the action so that competence of counsel and administration of a suit are in the hands of those parties with the ultimate interest.

We therefore return to our previously enunciated conclusion that the law of California would not be applied under the choice of law rules of California as that state has no interest in having its laws apply. Plaintiff admits this fact. Furthermore, we believe that Pennsylvania also has no governmental interest in having its wrongful death laws apply. For the protection of the real parties in interest in

this suit we believe that the application of Scottish law would further the purpose of the laws of Scotland with respect to the restrictions on proper plaintiffs. We believe that the California courts would therefore apply the law of Scotland to this suit. Even if we assume that the Plaintiff is correct and that Pennsylvania law would be applied by the California courts to this case, this does not aid the Plaintiffs position.

There exists a conflict among the three forums in the law of products liability. Scotland only recognizes negligence as a basis for liability while the two states apply the rule of strict liability. California has no interests in having its products liability law apply and thus under the California choice of law rules it would not apply its own law. See, *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P. 2d 719 (1976); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P. 2d 727 (1967). Our choice is thus between Scottish law and the law of Pennsylvania.

The law of Scotland in not recognizing strict liability is more limited in terms of liability than Pennsylvania. Generally, such a restriction provides an indication that the law seeks to limit the liability of its resident manufacturers to those cases where negligence can be shown; that only culpable conduct will result in liability. If the only purpose of the requirement of proof of negligence is to aid manufacturers in Scotland, then we may assume that the purpose of the law will not be furthered by applying it to American manufacturers.

Pennsylvania's interests in recognizing strict liability is foremost in ensuring that citizens will be compensated for injuries resulting from defective products. There does exist in the imposition of strict liability on manufacturers an element of deterence. While the element of compensating injured residents outweighs the deterence factor, at least some slight interest on the part of the state of

Pennsylvania would be furthered if the law of Pennsylvania were applied to Defendant Piper. No Pennsylvania governmental interest, however, would be promoted by the application of Pennsylvania law to Defendant Hartzell. Since none of the decedents nor their relatives were Pennsylvania citizens, Pennsylvania's interest in compensating its injured citizens is of little weight. While the interest of Pennsylvania in applying its laws is indeed slight, neither of the other forums has any apparent interest in applying their laws and we therefore assume that California courts would apply Pennsylvania law under the choice of law rules of California.

In summary, under the California choice of law rules, it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation, Plaintiff would not be a proper litigant. Second, the strict liability law of Pennsylvania would likely apply to Defendant Piper and not the negligence law of Scotland.

Next, we will briefly review the law that should apply to Defendant Hartzell under Pennsylvania choice of law rules. As Plaintiff accurately points out in her brief, the courts of Pennsylvania follow the significant contacts approach. In *Griffith v. United Airlines*, 416 Pa. 2d 1, 203 A. 2d 796 (1964), the Supreme Court of Pennsylvania adopted the rule of the Restatement Second of Conflicts of Laws, section 145, which states that in a tort action, the rights and liabilities of the parties are determined by the local law which has the most significant relationship to the occurrence or to the parties. "To determine which law has the most significant relationship, the court is instructed to consider: the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, place of incorporation, or the place of business of the parties; and the place where the relationship

between the parties is centered." *Lewis v. Chemetron Corporation*, 448 F. Supp. 211, 212 (W. D. Pa. 1978); *Zurzola v. General Motors Corporation*, 503 F. 2d 403 (3d Cir. 1974); *Samuelson v. Susen*, 576 F. 2d 546 (3d Cir. 1978). Any analysis of the relevant contracts in the instant suit leads to the inevitable conclusion that the courts of Pennsylvania would apply the law of Scotland to this action.

To reiterate some of the crucial aspects of the contacts, we begin with the fact of the accident in Scotland. The conduct giving rise to the injury occurred in one of three places, Ohio, Pennsylvania, or Scotland. The real parties in interest are domiciled in Scotland, are residents of Scotland, while the Defendants are located in Ohio and Pennsylvania. We will not outline the contact in any more detail as we find the weight of the contacts with Scotland to be overwhelming. We hold that the law of Scotland would apply in the instant action to Defendant Hartzell.

We will now once again turn our attention to the public interest factors of Gulf Oil. As Gulf Oil recognized an extremely important factor in the balance of interests is the fact that foreign law will govern all or part of a case. 330 U. S. at 508; *see also, Farmanfarmaian v. Gulf Oil Corporation*, 437 F. Supp. 910, 924 (S. D. N. Y. 1977); *Domingo v. States Marine Lines*, 340 F. Supp. 811, 816 (S. D. N. Y. 1972); *Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977); *DelRio v. Ballenger Corporation*, 391 F. Supp. 1002, 1004 (D. S. C. 1975); *Fitzgerald v. Westland Marine Corporation*, 369 F. 2d 499, 502 (2d Cir. 1966); *McCarthy v. Canadian National Railways*, 322 F. Supp. 1197 (D. Mass. 1971). We have determined that Scottish law will govern part of this case. We, of course, are not familiar with the law of Scotland and would have to rely on experts from that country. *See, Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448

(2d Cir. 1975). Clearly, it would be better for all parties for this case to proceed in a court in Scotland that is at home with the law of that country. This case is further complicated by the fact that different laws would apply to different parties. The result of this would no doubt cause hopeless confusion and would likely lead to inconsistent or an inequitable result if a trial were held here. Dismissal of this action avoids unnecessary problems of conflict of laws and the application of foreign law.

Another factor that Gulf Oil suggests that we consider is the unfairness of burdening citizens in this forum with jury duty when this forum has little connection with the controversy. The only connection with this forum is that the plane was manufactured in this district years before this accident. Trial of this case would take weeks and we do find that it would be an unfair burden to impose this on the citizens in this community. Also, it would be a huge burden on this court in terms of both time and the costs involved. Our court is too congested for us to try an action that belongs in a foreign forum. *See,* Gulf Oil at 508509; *DelRio v. Ballenger Corporation,* 391 F. Supp. 1002, 1005 (D. S. C. 1975); *Michell v. General Motors Corporation,* 439 F. Supp. 24, 28 (N. D. Ohio 1977); *Domingo v. States Marine Lines,* 340 F. Supp. 811, 816 (S. D. N. Y. 1972); *Dahl v. United Technologies Corporation,* 472 F. Supp. 696, 701 (D. Del. 1979).

If we attempted to try this action in this forum the administrative and legal difficulties would be extreme. The legal problems include determining the serious and complex conflict of law questions, which this memorandum has only touched on. Likewise, the large numbers of witnesses that would be needed from Scotland, the British Isles, Ohio, and California would likely cause administrative difficulties. The physical evidence is in Scotland or the British Isles. We also note that Scotland has

a large interest in the outcome of this litigation as it occurred in its airspace. The case thus may shed light on considerations which affect the safety of its citizens. *See, Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448 (2d Cir. 1975)). All of these matters lead us to conclude that the public interest would be better served by a trial in Scotland.

That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum. *See e.g., Michell v. General Motors Corporation*, 439 F. Supp. 24, 27 (N. D. Ohio 1977); *Texaco Trinidad v. Astro Exito Navegacion S.A.*, 437 F. Supp. 331, 333-34 (S. D. N. Y. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F. 2d 448, 453 (2d Cir. 1975).

The Plaintiff by brief and at oral argument asserted that the Defendants should be estopped from seeking dismissal of this action on *forum non conveniens* grounds. No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. Plaintiff argues that since the case has been transferred once before and for the reasons stated by Defendants in their briefs that they should now be estopped from arguing that the Middle District is not a proper forum. A reading of the briefs filed by Plaintiff in response to the transfer motion, in accordance with this argument, would lead us to conclude that Plaintiff should be estopped

from raising this argument. The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for *forum non conveins* first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.

The action will be dismissed on the conditions that the Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts.

An appropriate order will be entered.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

DATED: October 19, 1979

ORDER

Filed October 19, 1979
[Caption omitted in printing]

ORDER

AND NOW, this 19th day of October, 1979, in accordance with the memorandum this day filed, IT IS ORDERED that this action be and is hereby dismissed on the ground of *forum non conveniens.*

IT IS FURTHER ORDERED that the Defendants shall waive any statute of limitation defense that they may have in the courts of Scotland and that they submit to the jurisdiction of the courts of Scotland as a condition to the above ordered dismissal.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

AFFIDAVIT OF RONALD C. SCOTT AND EXHIBIT "A" THERETO

Filed October 30, 1979

[Caption omitted in printing]

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss:

RONALD C. SCOTT, being first duly sworn deposes and says:

Counsel for plaintiff has filed an Affidavit with this Court bearing the date 8th of October, served upon this defendant by mail on 16th October 1979 which contains statements which, in the view of the affiant require correction upon the record.

The plaintiff's counsel's Affidavit denies that the hearing referred to in affiant's last Affidavit was a trial, which is a statement which would have caused considerable surprise to the many barristers, solicitors and court officers who spent three weeks in an Edinburgh courtroom trying an appeal from the findings of the Department of Trade investigators, of which the plaintiffs were notified and to which they were invited to give evidence and participate. It was a statutory trial under the United Kingdom Civil Procedures Act and, within the meaning of the principles of res adjudicata, an adversary proceeding. An opportunity was provided to the plaintiff to present all evidence against the defendants. No evidence such as is referred to by counsel for the plaintiff as having been discovered by plaintiff's having sent investigators and experts to Europe to examine the wreckage was ever referred to except to the extent that the plaintiff's alleged experts succeeded in beguiling the British Department of Trade investigators into making the proven false findings they did find.

Plaintiff's attorney comments upon the authority cited by your affiant. No comment is required to demonstrate the emptiness of the comments other than a citation in an official reporter of the case earlier cited, *Dahl v. United Technologies Corporation*, which now appears at 472 F. Supp. 696.

Finally, plaintiff's attorney cites and attaches to his opinion the overruled finding of the Department of Trade investigators and omitted to advise the Court that the decision and findings had been found without foundation. Attached hereto and made a part hereof as Exhibit "A" is a true and correct copy of the advance copy of the appellate opinion of Lord Jauncey overruling the findings to which plaintiff's counsel referred.

Very respectfully,

/s/ RONALD C. SCOTT
Ronald C. Scott

[jurat omitted in printing]

Exhibit "A"

Review of the Aircraft Accident Report on the accident to Piper PA E 23 (AZTEC) Series 250 G-AYSF at Moffat, Dumfriesshire on 27 July 1976.

Report before Mr C E Jauncey, QC, now The Hon Lord Jauncey and Captain Duncan McIntosh, OBE AFC Mr John Barker (Technical Assessors).

APPEARANCES

Mr C N McEachran, Advocate and Mr Robert Black	(Instructed by the Crown Agent) appeared as Counsel on behalf of the Review Board.
Mr C K Davidson, QC	(Instructed by Messrs Shepherd & Wedderburn, WS) appeared for Hartzell Propeller Inc.
Mr J A Cameron, Advocate	(Instructed by Messrs W & J Burness, WS) appeared on behalf of Avco-Lycoming Inc.
Mr Harvey Crush	Of Messrs Norton, Rose, Botterall & Roche, Solicitors, London appeared on behalf of the Piper Aircraft Corporation.
Mr I R Hamilton, Advocate	(Instructed by Messrs Boyd Jameson & Young, WS) appeared on behalf of Air Navigation and Trading Company Limited.

Mr A C M Johnston, Advocate	(Instructed by Messrs Bonar, Mackenzie, WS) appeared on behalf of the Civil Aviation Authority.
Mr Scott Baker, QC (of the English Bar)	(Instructed by Messrs Hagart & Burn-Murdoch, WS) appeared on behalf of the Personal representatives of the deceased pilot.
Mr D J D Macfadyen, Advocate	(Instructed by the Solicitors Office, Department of Trade) appeared on behalf of the Accident Investigation Branch of the Department of Trade.

Mr A D McKay of Messrs Patrick & James, WS appeared at the Preliminary Hearing on behalf of McDonald Aviation Limited but did not appear thereafter.

Mr J A D Innes of Messrs Dundas & Wilson, CS appeared on behalf of the representatives of the deceased passengers but asked leave to withdraw at an early stage in the proceedings.

LIST OF DOCUMENTS

Report dated 10 November 1977 on Engineering data prepared by C A Protheroe, Inspector of Accidents.

Report dated 8 November 1976 with addendum dated 1 April 1977 prepared by D W Squire, Chief Engineer, Engine Overhaul Department, CSE (Aircraft Services) Limited.

Report dated 22 December 1976 on tests carried out to determine rate of oil leak from propeller governor prepared by Hants & Sussex Aviation Limited. (W Dietz and D Jackson)

Report dated 10 November 1976 on fuel test prepared by J Hughes for the Director of Materials Quality Assurance, MOD.

Report dated 12 January 1977 on oil test prepared by R F Tollervey for Director of Materials Quality Assurance, MOD.

Report dated 29 October 1976 on parts of propeller control unit prepared by A Q D Laboratories. (Miss J W Harris and Mr V H Cripps)

Flight Test Report dated 1 October 1976 and addendum thereto prepared by D Cummings, Flight Test Engineer, Civil Aviation Authority, Airworthiness Division.

Copy letter dated 27 October 1976 from J R W Smith, Flight Test Engineer, Civil Aviation Authority, Airworthiness Division to Piper Aircraft Corporation.

Excerpt from Lycoming Operator's Manual.

Excerpt from Lycoming Parts Catalogue.

Excerpt from Tighening Torque Recommendations referred to in Lycoming Operator's Manual.

Report of LATCC FIR(N) Controller.

Flight Test Results by Mr Guinther for Hartzell.

Photographs.

Documents relating to Pilot's Aztec Training.

Engine Lubrication Diagram.

Letter from Pilot in Command of G-AYSF's previous flight.

Technical Log Sheet of G-AYSF's previous flight.

Aero-nautical Chart of Northern England.

Two Port Engine Log Books.

Port Propeller Log Book.

Piper Aircraft Corporation Flight Manual.

British Supplement to above Flight Manual.

McDonald Aviation Limited's Training and Operator's Manuals.

Certified Computer Print-out relative to reports concerning Hamilton Standard or Hartzell Propeller Governor Bolts or Nuts.

Port Engine Record.

Specification of C.S.U. Fixing.

Extract from Lycoming Operator's Manual.

Large Engine Drawing.

Copy Lycoming Service Letter.

Lycoming Engine Overhaul Manual.

Mr Light's Friction Horsepower Calculation.

C.A.A. Flight Test of G-AYSF.

C.A.A. Flight Test Schedule No. 3.

Drift Down Time Calculations for G-AYSF.

Three N.A.T.S. Radiotelephony Transcripts.

PRELIMINARY

Accident

1 During a charter flight from Blackpool to Perth on 27 July 1976 a Piper PA E 23 (Aztec) Series 250—G-AYSF struck a hill approximately 2,500 feet amsl. some 7 nautical miles north east of Moffat, Dumfriesshire at about 1756 hrs. The aircraft was destroyed by fire and the pilot and five passengers were killed. The flight in question was the return leg of a flight which had originated that morning at Perth in a Piper Aztec aircraft owned and operated by McDonald Aviation Limited although the

pilot was employed by Tayside Aviation Limited. The aircraft in which the flight commenced became unserviceable at Blackpool and the pilot obtained a substitute aircraft from Air Navigation and Trading Company Limited. The circumstances in which authorisation was granted by McDonald Aviation Limited to the pilot to effect this change were not disclosed. The aircraft G-AYSF had returned to Blackpool from Leeds under the command of another pilot shortly before the final take-off for Perth.

Investigation

2 The Chief Inspector of Accidents ordered Mr. Westlake, a Principal Inspector of Accidents to carry out an investigation into the accident. Mr. Westlake commenced the investigation with the assistance of Mr. Cairns, an Operations Inspector and Mr. C A Protheroe, an Engineering Inspector. Mr Westlake retired before the investigation was completed and Mr Cairns subsequently died. Mr P J Bardon thereafter became Principal Inspector and completed preparation of the report for submission to the Secretary of State for Trade. A copy of the proposed report was, pursuant to regulation 11, served upon Hartzell Propellers Inc, *inter alios*.

3 Hartzell Propeller Inc (hereinafter referred to as "Hartzell") gave notice that they wished the findings and conclusions in the report to be reviewed by a Review Board under Regulations 12 and 13.

Proceedings of Review Board

4 On 9 October 1978 a Preliminary Meeting was held at which directions were given for the preparation and conduct of the Review.

5 At that meeting the following parties were granted leave to appear at the Review under Regulation 13(7):

Piper Aircraft Corporation

McDonald Aviation Limited

Air Navigation and Trading Company Limited

The Civil Aviation Authority

The representatives of the deceased passengers

The representatives of the deceased pilot

The Accident Investigation Branch of the Department of Trade.

6 On 15 November 1978 Captain Duncan McIntosh, OBE AFC (Pilot Assessor), Mr John Barker (Engineering Assessor) and I visited the Royal Aircraft Establishment at Farnborough in order to see the wreckage of the aircraft laid out in a hanger.

7 The Review Board sat in the Land Court, Edinburgh to hear evidence and submissions on nine days:

4, 5, 6, 7, 8, 11, 12, 13 and 14 December 1978.

8 Oral evidence was given by:

Mr R F Tollervey, Higher Scientific Officer of the Materials Quality Assurance Directorate of the Ministry of Defense.

Mr D W Squire, Chief Engineer of C.S.E. Aircraft Services Ltd.

Mr J R W Smith, Flight Test Engineer, Civil Aviation Authority.

Mr C A Protheroe, Inspector of Accidents.

Mr P J Bardon, Principal Inspector of Accidents.

Mr W B Harlament, Chief Engineer, Hartzell Propeller Inc.

Mr J Bailey, Vice President of Aerospace Management Services International.

Mr W M Guinther, Pilot Instructor.

Mr V H Cripps, Senior Technical Officer, A.Q.D. Laboratories, Harefield.

Mr A E Light, Vice President Engineering, AVCO Lycoming Division, Lycoming Corporation.

Mr C F Wilson, Director of Engineering, Piper Aircraft Corporation.

Mr P E Reeve, Pilot Instructor.

Mr H Best Devereux, Consulting Aero-nautical Engineer.

Facts and Conclusions

9 In the absence of any RTF transmission from the aircraft indicating distress or emergency, and in view of the extensive fire damage which occurred after impact the Inspectors were forced to build up, so far as they could, from the material available a probable reconstruction of the circumstances of the accident. Mr Protheroe, who was principally concerned with this reconstruction and who was present at the *locus* before the wreckage was removed concluded that distribution of the wreckage and the damage sustained by the seat frames and fuselage frames pointed towards a spin-type impact in which the aircraft had a high rate of descent with little forward speed. This conclusion was broadly accepted by all the parties present at the Hearing. Mr Protheroe also found the following facts which appeared to him to be of particular significance:

(1) A dent in the leading edge of one blade of the port propeller and chordwise marks in the vicinity of the dent.

(2) Damage to the underside of the port spinner in contrast to more general damage to the starboard spinner.

(3) Witness marks in the propeller cylinder assembly.

(4) The position of the port engine control cables in the cockpit which was similar to that in which they would have been if the pilot had taken action to shut down the port engine.

(5) The latches in the port propeller cylinder assembly which retain the propeller close to the fine pitch stop were all wholly or partially engaged.

(6) All four nuts securing the port propeller governor unit were loose and a 10 thousand feeler gauge could be inserted between the mounting flange and the crankcase.

(7) There was a quantity of oil distributed on the inside of the upper panel of the port engine cowling.

10 From these facts Mr Protheroe reached the following conclusions which were accepted by Mr Bardon:

(1) that the Governor Unit had become loose before impact with a consequential leak of oil therefrom;

(2) that for some reason, probably because he became aware of the oil leak, the pilot attempted to shut down the port engine;

(3) that he was unable to feather the propeller because windmilling r.p.m had fallen unusually quickly below the minimum r.p.m. at which feathering was possible; and

(4) that this rapid decay of r.p.m. was due to increased friction in the engine consequent upon the loss of oil from the Governor Unit.

11 It was around these conclusions that the principal dispute took place.

Governor Unit

12 If the Governor Unit was loose before impact there can be no doubt that it could only have been as loose as it was found to be by Mr Protheroe for a very short time. The rate of oil loss through the gap at a pressure of 300 p.s.i. was calculated to be 2.7 imp. pints per minute which would have emptied the sump in a few minutes and this had not occurred. In reaching the conclusion that the Governor Unit had become loose before impact Mr Protheroe relied on the examination of the studs which secured it to the crankcase, which examination had been carried out by AQD Laboratories and on the amount of oil found on inside of the cowling. There was, however, some doubt as to the extent of that examination. Mr Protheroe thought that the threads in the light alloy casting of the crankcase which received three of the four steel studs had been examined and found to be intact whereas Mr Cripps who carried out the tests considered that no such examination had been made since no mention thereof appeared in the Test Report. He further considered that distortion would be more likely to have occurred in the light alloy casting than in the steel studs and agreed that in the absence of information as to whether there was distortion in the casting the investigation could not be assumed to be complete. Mr Light with whose evidence as a whole I was much impressed also thought that failure or deformation of threads would first be found in the casting as happened in the case of the vacuum pump mounting

studs and that in any event an examination after the studs had been withdrawn could destroy evidence of distortion because of the interference fit of the studs.

13 So far as the oil on the inside of the cowling is concerned there is no doubt that it could have come from a loose Governor Unit but it could also have come from other sources in the engine and the presence of oil in such a position and in such quantity is I am informed by my Assessors by no means unusual. It is reasonable to assume that the prosecution of inquiries at the premises of Air Navigation and Trading Company Limited would have cast some further light on the likely source or sources of this oil. However, Mr Protheroe did not interview any person who had been concerned with the maintenance of the aircraft during the weeks prior to its last flight nor did any such person give evidence. Furthermore no documentary evidence was obtainable from Air Navigation and Trading Company relating to the consumption of oil of either engine although I asked for production of any such records at the Preliminary Hearing and am informed by my Assessors that it would be very surprising if no such records had ever existed. Indeed the only information about the aircraft other than what was contained in the various logs produced was a short letter from the pilot who had flown it earlier on the day of the accident stating that during his flight there had been nothing unusual with the handling or the engine.

14 In the foregoing circumstances I consider that it would be unsafe to assume that the Governor Unit had become loose prior to the impact. However even if it had I am satisfied that no criticism can be levelled at the method of securing the nuts. Mr Protheroe agreed that the possibility of properly torque-tightened nuts coming loose was remote and Mr Light, in his very considerable

experience, had never heard of one properly torque-tightened Governor Unit nut slacking off after a substantial period of trouble-free operation let alone four such nuts at the same time. Mr Light further considered that the system of nut and washers used to secure the Governor Unit was entirely satisfactory. In the absence of any suggestion that properly torque-tightened nuts on a similar Governor Unit had ever come loose before I consider that Recommendation 4.2 is neither justified nor necessary.

15 However the condition of the Governor Unit immediately prior to the accident is really peripheral to the circumstances with which this Report is concerned since a leak of oil therefrom can have done no more than precipitate the chain of events which resulted in the crash.

Shutting Down the Engine

16 In concluding that the pilot had shut down the engine at some time before impact Mr Protheroe relied on the position in which he found the port engine control cables in the cockpit as well as on the damage to the blade of the port propeller. This damage in Mr Protheroe's view suggested that the propeller was not under power at the time of impact in contrast to the damage on the starboard propeller which indicated that it was powered. It was sought to argue that no inference could be drawn from the position of the control cables because such cables were frequently displaced in an accident particularly where the engine in question was separated from its mounting. While I have no doubt that control cables can be displaced in a crash I consider that it was highly improbable that random displacement of the cables could have produced a result so consistent with some action having been taken by the pilot to reduce significantly the power on the port engine. Furthermore no reason other than a sub-

stantial reduction in power on the port engine was suggested as the cause of the spin. In these circumstances I consider that the pilot had probably moved the port engine controls to positions which would substantially reduce the power in the engine.

17 However I do not consider that it can be inferred on a balance of probabilities that the pilot had pulled the pitch control lever as far back as the feather position. On examination at the *locus* the difference in extension of the two throttle control cables was found to be 1.95 inches which, with a normal designed travel of 2 inches was indicative of full throttle on the starboard engine and closed throttle on the port. The difference in extension of the two propeller pitch control cables was 1.5 inches and the normal designed travel thereof was 2.25 inches. Thus if the two propeller pitch control cables had been in their relative positions at the time of impact the result would have been either that the starboard propeller pitch had been selected to coincide with the highest r.p.m., i.e. 2575 and the port control had not been pulled sufficiently far back to feather the propeller, which only occurs in the last one-half inch of travel, or the port propeller had been feathered but the starboard lever had not been operated to produce full power. Both of these situations would have had a deteriorating effect on performance but from a consideration of the controls alone neither can be said to be more likely than the other.

Position of Propeller on Impact

18 Mr Protheroe concluded that the port propeller had not been feathered from the damage which he found thereon, and from the witness marks on the inside of the propeller cylinder assembly. The marks on the propeller blade and the damage to the spinner led him to believe that the propeller struck the ground in a position about 8

to 2 o'clock when viewed from the front and in fine pitch with the latches engaged. The witness marks were consistent with the piston in the cylinder assembly being very close to the fine pitch stop.

19 Mr Harlament on the other hand considered that the blade was driven into the fine pitch position by the impact having immediately prior thereto been at an angle of about 35°. He explained in considerable detail by reference to a model how, with the blade in approximately the same position in the quadrant as that assumed by Mr Protheroe, and at any angle from 15° to the feather angle of 80° the force applied by the downward movement of the aircraft when the tip hit the ground would bend the blade forcing it to rotate in an aft direction until the load applied to it forced the stop screw against the fine pitch stop by which time the latches would have engaged. The witness marks found on the fine pitch screw were consistent with the application of such force. Mr Harlament then expressed the view that by reason of certain marks on the pre-load Plates the blade had probably been at an angle of 35° on impact.

20 I do not consider that the marks on the pre-load Plates upon which Mr Harlament relied, when these marks are compared with other pre-load Plates which were produced, support his conclusion as to the precise angle of pitch of the propeller when it hit the ground. I was however impressed by his evidence as to the likely effect of the impact on the blade and his reasons for concluding that the latches were not engaged at the time of impact. I therefore consider that it is more likely that the latches were not engaged when the propeller struck the ground.

Behaviour of Port Engine on Pilot Reducing Power

21 In his speech at the conclusion of the evidence Counsel for the Accident Investigation Board submitted

that it was no longer appropriate to suggest that there was increased friction in the port engine as a result of the loss of oil. I consider that Counsel was absolutely correct in making this submission. The evidence of Mr. Light as to the method of lubrication of the engine demonstrated conclusively that even if there had been a substantial loss of oil from the engine in flight it could not in view of the condition in which the engine was found have resulted in any increased friction due to overheating.

22 This submission by Counsel for the Accident Investigation Board must have a profound effect upon the conclusion that the latch engagement occurred at an air speed higher than normal. Although I have reached a conclusion that the latches were probably not engaged at the time of impact there can be no certainty in a matter such as this and it is proper that I should also consider the Findings which are subject to challenge upon the basis that the latches were engaged. Counsel submitted that notwithstanding the fact that any oil leak did not increase the engine running friction nevertheless the Board should have regard to possible variations in engine friction as a general proposition as a possible cause of latch engagement at a higher air speed than normal. I do not consider that this proposition has any foundation in fact.

23 Having regard to the distance travelled and the time which had elapsed since take-off it was generally agreed that at the time of the last radio transmission at 1752 hrs. the engines were likely to be turning over at about 2400 r.p.m. In normal course of events after closing the throttle of an engine several seconds will elapse before the windmilling r.p.m., if indeed it is going to fall so far, falls below 1000 which is the limit below which, according to the Flight Manual, feathering is impossible, although in fact feathering is still possible at least down to 900 r.p.m. and possibly to 800 r.p.m. At the best single engine

rate of climb which is 102 m.p.h. windmilling speed would stabilize at 1400 r.p.m. The time required to pull back the throttle lever to the closed position and to pull back the pitch control lever to the feather position is minimal. Thus unless r.p.m. had decayed abnormally fast after closing the throttle a situation would never arise in which, the normal procedure having been carried out, feathering would be impossible if the throttle were closed down from cruising speed. Such abnormal decay in r.p.m. from 2400 could not have occurred without some mechanical reason. No such reason, other than increased friction due to loss of oil was advanced and since that reason is now accepted as no longer valid I am driven to the conclusion that if the r.p.m. of the port engine did fall below that at which feathering was possible this was not due to any mechanical reason. It is significant that Mr. Wilson, the Engineering Director of the Piper Aircraft Corporation knew of no case in their testing of the Aztec Aircraft where feathering had been impossible.

Maintenance of Height with Windmilling Propeller

24 In the proposed Report it was stated that "the effect of a windmilling propeller compared with a feathered propeller on a failed engine is therefore a decrement of 350 ft/min in Flight Manual Schedule data". This statement was based on tests carried out by Mr Cummings on a Piper Aztec "E" model G-AZWW on 3 September 1976. During the course of the hearing it was agreed that these results were not typical of an Aztec in as much as the performance of the live engine of the aircraft in question was sub-standard. The witnesses from the Accident Investigation Branch considered that a decrement of 220 ft/min was a more likely figure which would give a net rate of descent of about 50 to 75 ft/min. Hartzell relied on tests carried out by Mr. Guinther on 22 November 1978 which showed that from 2000 to 3000 ft. with the left

engine windmilling, the mixture control on, IAS 101.2 m.p.h. and the outside temperature at +1°C a Piper Aztec with a gross weight at take-off of 4940 lbs climbed at the rate of 125 ft/min. Adjusting these figures to the temperature prevailing at the time of the accident would reduce the above rate by 35 to 40 ft/min. Furthermore these figures were carried out with the engine mixture control on which would mean that the engine was delivering idling power and therefore the propeller was producing less drag than if it was being driven wholly by the airstream. Mr Wilson had not carried out tests but he thought a figure of 220 ft/min decrement was reasonable although it might be somewhat on the high side. Evaluating this evidence as best I can and with the benefit of advice from Captain McIntosh the Pilot Assessor I consider that it is probable that if the port engine throttle had been closed, the mixture control off, the propeller windmilling and maximum power on the starboard engine the aircraft would not have been able to maintain height.

25 It was suggested that because of the results of an airworthiness test carried out on 13 May 1976 the performance of G-AYSF was substantially above average and that therefore even assuming that a 220 ft/min decrement was appropriate for a windmilling propeller nevertheless because of the increased rate of climb resulting from the extra performance deduction of that decrement would still leave a net rate of climb albeit small. The fact in the test upon which the foregoing argument was rested was the entry of 2450 r.p.m. as the continuous maximum power at which the single engine climb test was carried out, whereas maximum continuous power is developed at 2575 r.p.m. Since the rate of climb at the stated r.p.m. was 10 ft/min above the scheduled rate it followed that with maximum power on the live engine a rate of climb of the order of 80 ft/min in excess of the scheduled rate would have been achieved.

The person who carried out the test did not give evidence and I am advised by Captain McIntosh that it is unlikely in the extreme that anyone would have conducted such a test with reduced rather than maximum power on the live engines. I do not therefore consider that any reliance can be placed on the figure of 2450 r.p.m. in evaluating the performance of G-AYSF.

Findings in Relation to Challenged Conclusions

26 *Finding (iii)* can no longer stand in view of my conclusions (a) that it would be unsafe to assume that the Governor Unit had become loose prior to the impact and (b) as to the position of the latches at the moment of impact.

27 *Finding (iv)* has already been emasculated by Counsel for the Accident Investigation Board's submission that it was no longer appropriate to suggest that there was increased engine running friction due to a partial loss of oil. However as I have also reached a conclusion that the latches were not engaged at the time of impact it follows that no part of this finding can stand. As I have already remarked even if the latches were engaged no mechanical reason has been advanced for their engagement at an air-speed higher than normal.

28 *Finding (v)* is a wholly accurate comment on the Feathering Procedure in the Flight Manual. However as I have reached a conclusion that feathering was not impossible and that in any event there was not reason for the r.p.m. to have fallen so rapidly as to engage the latches before feathering could take place and in view of Mr Wilson's evidence that he knew of no case during testing where feathering had been impossible I can no longer see any content for this finding.

29 *Finding (vi)* can properly stand for the reasons which I have given under the immediately preceding heading.

30 *Finding (vii)* was not challenged.

31 *Finding (viii)* ceases to have relevance to the accident in view of my conclusions as to the probable state of the Governor Unit nuts at the time of impact.

Cause

32 The cause as set out in the proposed Report is now no longer appropriate and should read "The accident was probably caused by a loss of control following an attempt by the pilot to shut the port engine down. The aircraft entered a spin from which there was insufficient height to recover".

Other Matters in Report

(1) *Factual Information*

33 1.12.2.1. (a) the words "and the crank case thread was also undamaged" at the end of the third paragraph fall to be deleted for the reasons which I have more fully developed under the heading of Governor Unit.

(b) the last sentence of the fourth paragraph should also be deleted for the above reasons.

34 1.12.2.3. In view of my conclusion as to the latches probably not being engaged at impact the second paragraph cannot stand in its present form and should be amended to read as follows:

("The examination of the pitch change mechanism and the damage thereto indicated that at the time of impact the latches were probably not engaged. The point of latch engagement for this

type of propeller varies between individual propellers, but should lie in the range 19 to 22°. The fine pitch stop is normally set to approximately 14½° and the feather position is normally between 79 and 81°.")

35 1.16 Mr Bardon explained that the words "Flight Manual" at the bottom of page 9 should read "Owners Handbook".

36 The second paragraph on p10 accurately summarises the tests carried out by Mr Smith. However these tests were not carried out in order to reproduce the assumed situation which prevailed at the time of the accident but rather, as Mr Smith said, to obtain "factual information which substantiated the claims of the Flight Manual". Mr Smith further stated that he did not think that the data derived from the tests had any relevance to the accident.

37 The third paragraph on p10 which accurately summarises the test carried out by Mr Cummings must now be read subject to the qualification that the starboard engine of the aircraft in question was sub-standard in performance and that a more likely figure of decrement when the live engine was developing normal power would be 220 ft/min.

(2) *Analysis*

38 In view of the conclusions which I have reached as to (a) the latches being disengaged at the time of impact, (b) the Governor Unit having been slackened by the impact, (c) there having been no mechanical reason for any unusual decay r.p.m. on closing the throttle of the port engine the fourth and subsequent paragraphs of the analysis are substantially superseded and I do not consider that it would be profitable to attempt to correct and redraft them in detail.

39 However in view of the submissions which were made to me I think it right to comment on the following sentence on p12 of the proposed Report:

> "Certainly the necessity to maintain 1000 r.p.m. in order to feather ought to be given greater prominence in the Flight Manual than is the case".

40 The relevant entry in the Flight Manual is as follows:

> "*Feathering Procedure*
>
> Open operative engine throttle to maintain altitude and airspeed. MAINTAIN AT LEAST 102 MPH (BEST SINGLE ENGINE RATE OF CLIMB).
>
> Inoperative engine procedure is as follows:
>
> a. "CLOSE" throttle
>
> b. Prop control "FEATHERED". PROPELLER CANNOT BE FEATHERED UNDER 1000 RPM.
>
> c. Mixture control "IDLE CUT-OFF".
>
> d. Ignition switches "OFF".
>
> e. Electric fuel pump "OFF".
>
> f. Main fuel valve "OFF" inoperative engine."

41 Feathering is not a procedure which is only carried out by a pilot when an engine becomes inoperative but a procedure which he requires to carry out as a preflight test before every take-off. Thus a pilot must be aware of the Flight Manual procedure before he ever flies the aircraft and in these circumstances the fact that the words "PROPELLER CANNOT BE FEATHERED UNDER 1000 RPM" succeed rather than precede the words "Prop Control" "FEATHERED", ceases to have any significance since the pilot is not operating the controls and reading the

Flight Manual at the same time. Indeed Captain McIntosh advises me that as matter of practice a pilot should know all the information contained in the first 8 pages of the Flight Manual by heart. In these circumstances I see no need for any alteration of the way in which the feathering procedure is set out in the Flight Manual.

Other Matters

42 The conclusions which I have arrived at in relation to the Challenged Conclusions and the Analysis are unsatisfactory insofar as they substitute no positive conclusions for those of the Inspectors which I have rejected. No-party [sic] to the Review Proceedings sought to put forward any positive alternative reason why this accident happened and no evidence emerged from which I could safely draw any conclusion as to a positive alternative. Indeed it is implicit in the proposed Report and the detailed reasoning therein contained that any conclusion as to the cause of this accident could only be reached by making assumptions from such material as was available. However there are certain matters upon which it is appropriate that I should comment.

Reason for Pilot Reducing Power on Port Engine

43 If there was no oil leak from the Governor Unit why did he do it? This must necessarily be speculative but it is not without significance that the port engine log book contained a great number of entries covering general maintenance work which suggests that this engine might have been a rougher unit than the starboard. When the fuel injection nozzles of the port engine were flow tested after the accident by C. S. E. (Aircraft Services) Ltd one was found to be blocked and the other five had erratic flow. If the nozzles were in those conditions before the accident they would, I am advised by my Assessors,

undoubtedly have produced rough running. The pilot had never flown this aircraft before the flight and it is therefore possible that he had been concerned by the rough running of the port engine and reduced power.

Height of Aircraft Prior to Accident

44 At 1747 hrs. the pilot informed Sc. A. T. C. C. that he was descending to 3000 ft. to remain V. M. C. and at 1752 hrs., he informed Sc. A. T. C. C. of his intention to climb back to F. L. 35 to remain "V. M. C. on top". At this time his route involved flying over high ground up to 2756 a.m.s.l.

45 The Operations Manual of McDonald Aviation Limited who were the operators of the aircraft, provides *inter alia*:

"35-00 *MINIMUM SECTOR ALTITUDE*

The minimum flight altitude as defined below will be recorded on all Company Flight Plans.

(a) *Flight in controlled airspace* where the track is well defined by two separate aids not greater than 100 NMS apart, the minimum sector altitude will be 1500 ft. (on QNH) above the highest terrain or obstacle within 10 NMS of the intended track.

(b) *All other Flights*

1500 ft. (on appropriate QNH) above the highest ground or obstacle within 20 NMS of the intended track.

(c) For flights within 20 NMS of terrain having a maximum elevation exceeding 2,000 ft., the above clearance of 1500 ft. must be increased in accordance with the table below,

this applies to all flights including those in controlled airspace. The Captain must be conversant with the effect of Mountain Waves as outlined in Information Circular 7/68.

35-01

Elevation of Terrain	Windspeed			
	0-30	31-50	51-70	OVER 70
2 - 7000′	500′	1000′	1500′	2000′
Above 7000′	1000′	1500′	2000′	2500′

"

46 It is clear that immediately before the accident the pilot was not carrying out the above instructions.

47 If immediately before the accident the pilot was flying in or near the tops of cloud as Mr Bardon assumed it would appear that he was not observing rule 23(a)(i) of the rule of the air and Air Traffic Control Regulations 1974 (SI No. 1401) which provides:

"23. The Visual Flight Rules shall be as follows:

(a) Outside controlled airspace

(i) an aircraft flying outside controlled airspace above 3,000 feet above mean sea level shall remain at least one nautical mile horizontally and 1,000 feet vertically away from cloud and in a flight visibility of at least five nautical miles;"

48 While the height at which the pilot was flying immediately before the accident was in no sense a cause of the events giving rise to the accident, there is no doubt that had he been flying higher above the ground there would have been more time available for him to recover from the spin.

Pilot Inexperience and Error

49 The Pilot who was 22 years of age at the time of the accident had obtained his commercial pilot's license on 3 May 1976. He had commenced training with Tayside Aviation Limited on an Aztec on 27 April 1976 and completed it on 30 April 1976. He had thus less than 3 months experience in flying Aztec's between the conclusion of his training and the date of the accident.

50 It was suggested to Mr Bardon in cross-examination that the pilot had stalled the aircraft but he rejected this suggestion on the ground that this "would require a piece of really gross mishandling on his part". Mr Bardon having reached a conclusion that the latches had engaged prior to impact also rejected the suggestion that any action of the pilot had caused the latches to reach that position before the pitch control lever had been operating. I do not think that I am being unfair to Mr Bardon in stating that he never really considered that there might have been a human rather than a mechanical cause for this accident. In the light of the pilot's very limited experience I am not sure that this was not rather too naive an approach.

51 Even if the port propeller could not have been feathered this should not necessarily have produced fatal consequences. I am advised by Captain McIntosh that in the conditions prevailing at the time an experienced pilot would have been able to arrest any spin which developed by reducing power on the starboard engine and might well have been able to land the aircraft on flat ground without such disastrous consequences as here occurred.

52 There was not before me such evidence as would justify the making of any finding that the accident resulted from an error on the part of the pilot. However there

being no mechanical explanation for the aircraft developing a spin, other than possible rough running of the port engine which may have induced the pilot to reduce power I do not consider that a human cause be it attributable to error or merely to lack of practical experience in circumstances other than normal can be altogether ruled out.

/s/ C E JAUNCEY

We agree with the contents of this Report.

/s/ DUNCAN MCINTOSH
/s/ JOHN C BARKER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehily, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
C. A. No. 77-1159

Argued May 22, 1980
Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

(Filed July 24, 1980)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

This is an appeal from a dismissal of a wrongful death action on grounds of forum non conveniens. The issues include the factors to be considered in such a dismissal, the burden of persuasion on the motion, the scope of the trial judge's discretion, and the application of choice of law rules of California and Pennsylvania.

The event giving rise to this dispute was the crash of a Piper aircraft in Scotland in July 1976. The plane was owned by a Scottish air taxi service, the passengers and crew of which were Scottish. All persons aboard were killed and no witnesses survived the crash. There are indications, however, that something went wrong with the left engine for which compensatory action by the pilot was impossible, was unnecessarily difficult, or was ineptly handled by the pilot.[1]

Gaynell Reyno, a California resident and personal representative of the estates of various Scottish decedents,

1. Determination of these issues by the ultimate factfinder, of course, will be dealt with when the merits of the case are reached.

sued on their behalf in a California state court. Named as defendants were Piper Aircraft Corp., a Pennsylvania corporation that manufactured the aircraft; Avco Lycoming Engine Group, which produced the engine; and Hartzell Propeller, Inc., an Ohio corporation that built the propeller. The wrongful death action is based on theories of strict liability and negligence.[2]

On motions by Piper and Avco based on diversity of citizenship, the case was removed from the California state court to the federal district court in California. After the removal, Hartzell moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Middle District of Pennsylvania under 28 U. S. C. § 1404(a).[3] Piper moved to dismiss for failure to state a cause of action or, alternatively, to transfer the case to the Middle District of Pennsylvania and to strike the claim for punitive damages. The action was dismissed as to Avco with the agreement of plaintiff.

The district court in California entered an order (1) granting the motion to quash service of process as to Hart-

2. Plaintiff contends that the engine malfunction itself was the result of a design or manufacturing defect for which Piper is liable. In addition, the following dangerous and defective conditions in the aircraft are alleged: (1) inadequacies associated with the left propeller mechanism that prevented institution of emergency procedures in the event of engine loss; (2) design and manufacture of an aircraft incapable of single engine flight with a "windmilling" propeller; (3) manufacture of an aircraft with improper instruments for maintaining single engine operation; and (4) inaccuracies and omissions in the Aircraft Owners Handbook and flight manuals pertaining to emergency procedures and single engine operating speeds.

3. That section provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

zell on the ground that personal jurisdiction over Hartzell was neither authorized by California law nor in accord with due process; and (2) transferring the case to the Middle District of Pennsylvania pursuant to § 1404(a).

Subsequent to the transfer, Hartzell was validly served with process in Pennsylvania and then moved to dismiss the case on the common law ground of forum non conveniens. Piper filed a similar motion captioned as a request for judgment on the pleadings or summary judgment. Both motions were accompanied by affidavits. On the basis of the affidavits, the trial judge granted the motions to dismiss because of forum non conveniens on condition that defendants submit to personal jurisdiction in Scotland and waive any statute of limitations there. Reyno filed a timely appeal.

In this Court, Reyno raises two major contentions: (1) The judge erred in not holding defendants equitably estopped to assert that Scotland was a more appropriate forum, inasmuch as Piper had maintained in California that Pennsylvania was the most appropriate forum. (2) The trial judge abused his discretion in dismissing the action. Subsidiary, but arguably crucial, to this second point is the claim that the district judge's order was based on a legal error as to whether Scottish or Pennsylvania law applied to most or all of the case.

I. The Interaction of a Transfer Under § 1404(a), a Subsequent Forum Non Conveniens Motion, and the Concept of Preclusion

Reyno argues that the district court erred in not considering whether the defendants were equitably estopped from moving to dismiss. Essentially, she contends that, by following a successful motion to transfer the case from California to Pennsylvania with a motion to dismiss so that the case would have to be filed in Scot-

land, the defendants are trifling with the court and wasting judicial and litigant time and resources.

The district court's opinion did, however, consider plaintiff's argument and rejected it, albeit in a somewhat summary fashion:

> No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. . . . The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for forum non conveniens first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.[4]

The Court of Appeals for the Fifth Circuit has reversed the dismissal of an admiralty claim on forum non conveniens grounds for the reasons now pressed by Reyno. It declared that the defendant should not be permitted, after securing a statutory transfer from Louisiana to Georgia, to contend that Georgia was not really an appropriate forum; the defendant "may not 'so trifle with the judicial process.'"[5]

Defendants here urge, and the district court seemed to accept, that they did not take inconsistent positions before the district court in California and that in Penn-

4. 479 F. Supp. at 738.

5. Insurance Co. of North America v. Ozean/Stinnes-Linien, 367 F. 2d 224, 227 (5th Cir. 1966) (quoting Livesay Ind. v. Livesay Window Co., 202 F. 2d 378, 382 (5th Cir.), *cert. denied*, 346 U. S. 855 (1953)).

sylvania. The motion in California, defendants argue, simply represented that Pennsylvania was a better forum than California, whereas the present motion contends that Scotland is better yet. Furthermore, they aver, any inconsistencies are a result of fuller knowledge of the relevant facts.

Examination of the motions made by defendants in California reveals that their prior allegations are indeed at variance with their present contentions. A statutory transfer, as well as a common law dismissal, must be shown to be not only more convenient, but also in the interest of justice. In meeting that burden, Hartzell asserted in California that "the plaintiffs would easily have their interests herein protected and adjudicated by application to the courts located in the State of Pennsylvania, and in fact such would be overwhelmingly fair to all the parties herein." [6] Similarly, Piper argued that "[t]he propriety of transferring the within action to Pennsylvania for the convenience of the witnesses appears to overwhelm other factors, in view of the apparent theories of liability as against the defendants." [7]

Both defendants averred that, because the claim was based on strict liability, virtually all the evidence and material witnesses as to production and design would be in Pennsylvania or Ohio.[8] Furthermore, they argue that

6. Hartzell's Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Jurisdiction over the Person or for Transfer under 28 U. S. C. § 1404(a) at 8. No. CV-77-3181-IH (C. D. Cal., filed Oct. 11, 1977).

7. Piper's Memorandum of Points and Authorities in Support of Motion to Transfer under 28 U. S .C. § 1404(a) at 6. No. CV-77-3181-IH (C. D. Cal., filed Nov. 23, 1977).

8. Hartzell stated in its memorandum that "the records and employees of the . . . defendants herein are prospective evidence and witnesses, respectively." Piper asserted, "Necessarily, it would seem that all material witnesses on the liability issues reside in

new facts bearing on forum non conveniens were discovered after motions were filed in California.

At the time of the transfer motion all facts now alleged to be relevant—*e.g.*, where various witness are, where the crash occurred, where the wreckage was located, and who owned the plane—were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum non conveniens motion, they are hardly surprising or significantly new. What defendants really are arguing is that the case was not thoroughly researched before making the transfer motion.

Nevertheless, two factors weigh against an absolute preclusion to raise a forum non conveniens motion in this case: (1) The thrust of Hartzell's motion in the California court, and the contention accepted by that tribunal, was lack of personal jurisdiction. Arguably, then, it is not fair to make Hartzell responsible for proceedings there, even if it would be fair and proper as against Piper. (2) Forum non conveniens entails important considerations of public interest, in addition to those of the private litigants themselves. If defendants are correct in their assertion that trial in Pennsylvania would be unduly burdensome to the

8. (Cont'd.)

either Pennsylvania or Ohio." In reply to plaintiff's opposition to the transfer, Piper argued that the respective employees of Piper . . . and Hartzell Propeller, who were involved in the design, manufacture, testing, and assembly of the component parts in question, will be material witnesses, but they are located in Pennsylvania and Ohio. It is clear that the convenience of these witnesses is better served if the within action is pending in the State of Pennsylvania than if it is pending in the Central District of California."

court and the juror community, it might be self-defeating to raise an absolute barrier to pleading forum non conveniens. Hence, although a party who moves for transfer under § 1404(a) will not be automatically estopped to assert forum non conveniens after a transfer is accomplished, the fact that a party previously succeeded in a statutory transfer ought to be weighed against dismissing for forum non conveniens and as adding to a defendant's already substantial burden on the later motion.

II. Forum Non Conveniens Dismissal

The doctrine that an otherwise validly brought claim may be dismissed because the forum chosen was inconvenient for trial had its origin in the common law of Scotland,[9] became part of the common law of many states,[10] and has a long history of use in federal admiralty actions.[11] It was introduced into federal diversity jurisdiction by *Gulf Oil Corp. v. Gilbert*[12] and *Koster v. (American) Lumbermens Mutual Casualty Co.*,[13] decided in 1974.

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9. Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909-11 (1947). The issue of inconvenient forum as a question on the merits rather than of jurisdiction may be traced at least to 1845. See *id.* at 909 (citing M'Morine v. Cowie, 7 Dunl. 270 (1845)).

10. *See* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929); Braucher, *supra* note 9, at 911-12.

11. The doctrine in admiralty is thought to derive from dictum in Mason v. The Ship Blaireau, 6 U. S. 143, 157, 2 Cranch 240, 264 (1804). *See* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Rev. 12, 12 & n. 10 (1949); Braucher, *supra* note 9, at 920 & n. 79. *But cf.* Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 505 n. 4 ("The doctrine did not originate in federal but in state courts.").

12. 330 U. S. 501 (1947).

13. 330 U. S. 518 (1947).

Simple in enunciation but complex in application, the principle of the doctrine is "that a court may resist imposition upon its jurisdiction even when" neither jurisdiction nor venue is defective.[14] Forum non conveniens as a common law doctrine has been dormant for purposes of interstate dismissals within the federal system since the passage of 28 U. S. C. § 1404(a) soon after the two seminal Supreme Court cases.[15] That statute is similar to the common law doctrine, but authorizes transfers within the federal court system with a lesser burden—both substantively and procedurally—than a motion to dismiss.[16]

The question whether federal or state law of forum non conveniens applies in a diversity case was left open by the Supreme Court and has not definitively been decided by any court of appeals.[17] In this case, as in many

14. Gulf Oil Corp. v. Gilbert, 330 U. S. at 507.

15. 62 Stat. 937 (1948) (codified at 28 U. S. C. § 1404).

16. The statute is a revision rather than just a codification of forum non conveniens. It permits federal courts to grant transfers on a lesser showing of inconvenience than is required under the common law doctrine and there is no need for pleadings or documents to be refiled in the transferee court. The relevant factors to be considered, however, are the same. Norwood v. Kirkpatrick, 349 U. S. 29, 32 (1955).

17. The Erie question was a matter in controversy in both *Gilbert* and *Koster* until the cases reached the Supreme Court. In *Gilbert* the district court, relying on Weiss v. Routh, 149 F. 2d 193 (2d Cir. 1945), held New York law to apply and dismissed the action. 62 F. Supp. 291, 294 (S. D. N. Y. 1945). The Court of Appeals distinguished *Weiss*, held that federal law controlled, and reversed the trial judge for abuse of discretion. 153 F. 2d 883, 886 (2d Cir. 1946). A separate panel deciding *Koster* also applied federal law, but cautiously noted that the result would have been the same under state law. 153 F. 2d 888, 890 n. 2 (2d Cir. 1946). In considering the merits of the dismissal, the Supreme Court relied exclusively on Supreme Court cases, but then avoided discussion of the *Erie* problem with the following:

brought before the federal courts, federal law has been

17. (Cont'd.)

> The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. . . . It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

330 U. S. at 509 (citations to New York cases omitted). In *Koster* the Court was equally inscrutable. *See* 330 U. S. at 529 ("Since this case is pending in New York and is a diversity case, it is appropriate to observe that the law of New York, if applicable, is to the same effect as to the considerations to govern forum non conveniens questions in this class of cases.")

The Court's decision not to decide was sharply criticized by Professor Braucher who observed that it

> seems to have been arrived at by something like main force: in the *Koster* case it was contrary to the unanimous view of the circuit judges [that federal law applied], and in the *Gilbert* case it was reached only by ignoring the state court decision most nearly in point, which had been cited with approval by the New York Court of Appeals. Since the circuit court of appeals had not regarded the New York law as controlling, previous decisions suggest that if New York law were held to govern, the normal practice of the Supreme Court would be to remit the case to the lower court to determine that law.[123]
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> 123. Wertheim v. Clergue, 53 App. Div. 122, 65 N. Y. Supp. 750 (1st Dep't 1900); *see* Gregonis v. Philadelphia & R. C. & I. Co., 235 N. Y. 152, 139 N. E. 223, 225 (1923). The *Wertheim* case reversed dismissal of an action based upon false representations in the inducement and performance of a contract on the ground there was no discretion in "cases arising out of commercial transactions and affecting property." 53 App. Div. at 126, 65 N. Y. Supp. at 753. The Supreme Court relied on New York cases containing general statements that there is discretion to dismiss tort actions.

Braucher, *supra* note 9, at 928 (footnotes 122 and 124 omitted). Since the *Gilbert* and *Koster* cases, the Second Circuit has altered its position to indicate that the Erie question is an open one. *See* Thomson v. Palmieri, 355 F. 2d 64, 66-67 (2d Cir. 1966).

argued at all stages in the litigation.[18] Upon specific request for supplementary briefing in this Court, all three parties agree that if a choice is necessary, federal law should be followed, and cite numerous district court opinions and commentaries in support of that position.[19]

18. *See* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 434 n. 13 (D. C. Cir. 1976) ("Although the issue has never been squarely addressed by this Court, federal courts in the District [of Columbia] have in practice used the federal law of *forum non conveniens*.")

19. A footnote in *Koster* addressing the question whether federal courts have discretion to decline granted jurisdiction strongly points, along with the structure of the Court's reasoning in both *Gilbert* and *Koster*, toward use of federal rather than state law:

> Some of our cases appear to hold broadly that the federal courts must exercise their jurisdiction, when they have it, [citing cases]. But this is not a case in which it is urged that a state statute restricting remedy to state proceedings defeats federal diversity jurisdiction, as [those cases] were . . . . In those cases, the Court held that when a state recognizes a cause of action, suit may be brought on it in federal court if diversity jurisdiction is established. That holding has nothing to do with this case. *We are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.*

330 U. S. at 520 n. 1 (emphasis added). Moreover, in Parsons v. Chesapeake & O. R. Co., 375 U. S. 71, 73 (1963), which was not a diversity case, the Court held that "a prior state court dismissal on the ground of forum non conveniens can never serve to divest a federal district judge of the discretionary power [to transfer a case under § 1404(a)]." Virtually all the district courts and commentators that have squarely faced the issue have decided to apply federal law. *See, e.g.*, Poe v. Marquett Cement Manuf. Co., 376 F. Supp. 1054, 1057-59 (D. Md. 1974); Lapides v. Doner, 248 F. Supp. 883, 885-94 (E. D. Mich. 1965); Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 834-36 (S. D. N. Y. 1957); 1A (pt. 2) Moore's Federal Practice ¶ 0.317[2], at 3232-33 (2d ed. 1978); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3828, at 181 & n. 19 (1976).

They assert, nevertheless, that it is probably not necessary to decide between federal and state law because the cases dealing with forum non conveniens in both California and Pennsylvania have mirrored federal law in all essential respects. We agree.[20]

A. *Comparative Burdens, Trial Court Discretion, and Standard of Review*

A plaintiff is generally conceded the choice of forum as long as the requirements of personal and subject matter jurisdiction, as well as venue, are satisfied. He should not be deprived of the advantages presumed to come from that choice unless the defendant clearly shows

20. Opinions of the Pennsylvania Supreme Court have adopted almost verbatim the factors to be considered that are set out in *Gilbert's* and *Koster*, scope of trial court discretion, and standard of appellate review. *See* Rini v. N. Y. Central R. Co., 429 Pa. 235, 240 A. 2d 372 (1968); Plum v. Tampax, Inc., 399 Pa. 553, 160 A. 2d 549 (1960). The section of the Restatement regarding forum non conveniens, on which the Pennsylvania courts also rely, in turn relies on the major federal cases. *See* Restatement (2d) Conflict of Laws § 84 note (1971). California's forum non conveniens doctrine, formerly of common law origin, is now statutorily codified at Cal. Civ. Proc. Code § 410.30, Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 858, 544 P. 2d 947, 950, 126 Cal. Rptr. 811, 814 (1976). California law precludes, except in extra ordinary cases, a trial court from dismissing on forum non conveniens grounds an action brought, as in this case, by a California resident. *Id.* at 859, 126, 544 P. 2d at 950, Cal. Rptr. at 814. An exception to this limitation is made where, also as here, a California resident sues in a representative capacity for foreign beneficiaries. *See id.* at 860 & n. 6, 544 P. 2d at 951 & n. 6, 126 Cal. Rptr. at 815 & n. 6. In all respects relevant to this case, then, we find no dissimilarities in the factors considered under federal and California law. *Cf.* Jagger v. Superior Court, 96 Cal. App. 3d 579, 585-87, 158 Cal. Rptr. 163, 166 (1979) (outlining California law in manner essentially following *Gilbert* and *Koster;* concluding that satisfaction in divorce action between foreign celebrities should be deferred to English courts).

facts that "either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." [21] A court must balance these private and public interest factors, "[b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." [22]

The district judge believed that the plaintiff's choice of forum is of diminished significance, and the defendants' burden of showing inconvenience correspondingly less, when the plaintiff—more precisely, the real parties in interest—is foreign or when the forum chosen is not the plaintiff's home ground.[23] Neither of these burden-shifting principles may be found in opinions of the Supreme Court or this Court.

In support of the proposition that less solicitude is due a foreign plaintiff's choice of forum, the district court relied on a decision of the District Court for the Southern District of New York which stated that a foreign plaintiff's "choice of forum should be given less weight than the choice of an American plaintiff." [24] The court of appeals affirmed the judgment in that case, but disapproved of the district court's characterization of the forum non

21. *Koster*, 330 U. S. at 524.

22. *Gilbert*, 330 U. S. at 508; *see* Schertenleib v. Fraum, 589 F. 2d 1156, 1164 (2d Cir. 1978) ("We begin by noting that plaintiff chose this forum and defendant resides here. This weighs heavily against dismissal."); Hoffman v. Goberman, 420 F. 2d 423, 426-27 (3d Cir. 1970).

23. 479 F. Supp. at 731.

24. Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 927 (S. D. N. Y. 1977), *aff'd on other grounds*, 588 F. 2d 880 (2d Cir. 1978).

conveniens doctrine applicable to noncitizens.[25] Indeed, as the Court of Appeals for the Second Circuit has recently held, the citizenship of the plaintiff does not affect the defendant's burden under *Gilbert* and *Koster*. American citizenship of the plaintiff does not increase the defendant's burden, just as foreign citizenship may not lessen it.[26]

The holding by the trial judge that a plaintiff's choice is entitled to less weight when it is not the plaintiff's state of residency is somewhat difficult to follow when, as here, that party has already been forced to cede the "home court advantage" as a result of the defendants' previous motion to transfer the case from California to Pennsylvania.[27] It would be the rare situation in which a defendant could complain of being vexed or harassed by defending a lawsuit on his home ground.

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25. See Farmanfarmaian v. Gulf Oil Corp., 588 F. 2d 880, 882 (2d Cir. 1978).

26. Alcoa Steamship Co., Inc. v. M/V Nordic Regent, No. 78-7054, slip op. at 5960-68, 5973 (2d Cir. Feb. 25, 1980) (en banc). The court of appeals en banc thus seems to have overturned without specific mention the panel holding in Olympic Corp. v. Societe Generale, 462 F. 2d 376, 378 (2d Cir. 1972), that the defendant's burden is greater if an American plaintiff is to be relegated to a foreign forum. The *Olympic Corp.* opinion was also relied on by the district court here.

27. Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 F. R. D. 445, 453 (D. Del. 1978). The district court relied on Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 451 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976), which may have relied too literally on *Koster's* mention of deference to a plaintiff's choice of his home forum in setting forth the defendant's burden of establishing inconvenience. *See* 330 U. S. at 524. It is apparent that the *Koster* court was simply setting forth the proposition that, as between diverse citizens, convenience of a particular forum to one party will almost inevitably mean inconvenience to the other. Given this trade-off, the plaintiff's choice will generally be respected.

Of course, the Supreme Court has stated that "[t]he doctrine [of forum non conveniens] leaves much to the dicretion of the court to which plaintiff resorts," but this broad proposition was followed by the explanatory observation that "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." [28] The standard of review is one of abuse of discretion,[29] but if the trial court has not held the defendants to their proper burden or has clearly erred in weighing the factors to be considered, the equivalent of an abuse of discretion has been demonstrated. Discretion must be exercised within the applicable standards.[30] The district court's wide discretion may not serve the defendants as a burden-shifting device on appeal from an order in their favor.

B. *The Applicable Factors*

The *Gilbert* Court divided the elements to be considered into those affecting the private interests of the litigants and those in which the public has an interest.

28. *Gilbert*, 330 U. S. at 508.

29. DeMateos v. Texaco, Inc., 562 F. 2d 895, 897 (3d Cir. 1977), *cert. denied*, 435 U. S. 904 (1978).

30. *Cf.* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 436 (D. C. Cir. 1976) ("Where, as here, there has been no *weighing* of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused."). By way of analogy, it appears appropriate to note that on appeal from the grant of a preliminary injunction, "the standard of appellate review is simply whether the issuance of the injunction, *in the light of the applicable standard*, constituted an abuse of discretion." Doran v. Salem Inn, Inc., 422 U. S. 922, 931-32 (1975) (emphasis added). Thus, an order for a preliminary injunction may be reversed if the trial court "commits an obvious error in applying the law, or makes a serious mistake in considering the proof." A. O. Smith Corp. v. FTC, 530 F. 2d 515, 525 (3d Cir. 1976); *see* Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 357 (3d Cir. 1980).

The former include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained.[31]

Also relevant is the inability to implead other parties directly involved in the controversy.[32] These various ingredients are weighed to determine the "relative advantages and obstacles to fair trial."[33]

Among the public interest factors are problems of creating court congestion and imposing jury duty in litigation centers that are removed from the origin of the controversy, the benefit in a matter of public concern of holding the trial in a place accessible to the locality, and the appropriateness of having the trial in a forum that is familiar with the law governing the case rather than having a court elsewhere untangle foreign law.[34]

We will examine each of these factors to determine whether the defendants met their burden.

C. *Private Interests*

1. *Convenience of Witnesses*

If a dismissal is to be premised on the convenience of witnesses, more than a mere allegation to that effect is

31. 330 U. S. at 508.

32. *Id.* at 511; Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976).

33. *Id.* at 508.

34. *Gilbert*, 330 U. S. at 508-09.

required. The rule for a statutory transfer, which is to be more readily granted, is no less applicable to a dismissal for forum non conveniens:

> The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than on numbers. One key witness may outweigh a great number of less important witnesses. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied.[35]

The district court opinion does not discuss the need for such a showing, but rather merely refers generally to witnesses as to damages and witnesses as to the potential supervening negligence of the Scottish air taxi service, all of whom are in Scotland.[36] Nor do the defendants direct us to any affidavits setting forth the requisite specific information, and our search of the record detects none. The requirement of specificity would seem more acute in this case in view of the fact, mentioned above, that in motions before the district court in California the defendants made the claim, in some sense inconsistent with the position now taken though perhaps more ac-

35. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3851, at 270-71 (1976); *see* Marbury-Patillo Construction Co., Inc. v. Bayside Warehouse Co., 490 F. 2d 155, 158 (5th Cir. 1974); Texas Gulf Sulphur Co. v. Ritter, 371 F. 2d 145, 148 (10th Cir. 1967). This rule has wide authority in the district courts as well. *See, e.g.*, Follansbee Metals Co., Inc. v. John T. Clark & Son of N. H., Inc., 387 F. Supp. 574, 581 (W. D. Pa. 1974); Clay v. Overseas Carrier Corp., 61 F. R. D. 325, 331 (E. D. Pa. 1973); Shulof v. Westinghouse Elec. Corp., 402 F. Supp. 1262, 1264 (S. D. N. Y. 1975).

36. 479 F. Supp. at 732.

curate, that all witnesses relevant to strict liability or negligence in manufacturing are in Pennsylvania or Ohio.[37]

At the least, then, the district court did not have sufficient information to weigh the convenience of witnesses, and its conclusion that this factor favored defendants appears to be without the requisite foundation.

One further error in discerning the balance of inconvenience to witnesses deserves mention. The trial judge stated that the convenience of expert witnesses, like that of counsel, "is of small importance."[38] No explanation was given for this assertion,[39] but the theory seems to be either that expert witnesses are fungible or that their testimony can be introduced effectively by deposition. We agree with the authors of a noted treatise that this view is unsound.[40] In this case, as in many others, the testimony of expert witnesses will be crucial. Finding the most trustworthy and credible experts is not often easy, and the advantages of live testimony are not to be discounted.[41]

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37. *See* pp. 5-6 & note 8 *supra*.

38. 479 F. Supp. at 732.

39. The district court cited Car-Freshner Corp. v. Auto Aid Mfg. Corp., 438 F. Supp. 82, 85 (N. D. N. Y. 1977), which simply cites other cases without explaining. The proposition seems to be traceable to Nacona Leather Goods Co. v. A. G. Spaulding & Bros., Inc., 159 F. Supp. 269, 270-71 (D. Del. 1958), the judge in that case simply concluded that the inconvenience to plaintiff's expert in one forum was counter-balanced by the inconvenience to defendant's expert of trial in the other forum. It was not that the two were insignificant, but that they cancelled each other out.

40. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3852, at 275 (1976).

41. *Id.*; *see* Lykes Bros. S. S. Co. v. Sugarman, 272 F. 2d 679, 681 (2d Cir. 1959); Berkshire Int'l Corp. v. Alba-Waldensian, Inc., 352 F. Supp. 831, 834-35 (S. D. N. Y. 1972) (Weinfeld, J.); Medich v. American Oil Co., 177 F. Supp. 682 (E. D. Pa. 1959) (Biggs, J., sitting by designation).

B. *Availability of Compulsory Process and Impleader*

The defendants' major factual contention when the case comes to trial will be that the fatal crash at issue was caused not by any manufacturing or design defects, but by pilot error or the negligence of the foreign air taxi service. Inability to implead foreign third-party defendants was argued vigorously here as a problem with a trial in this country, and it has, of course, generally been considered an important consideration favoring a forum non conveniens dismissal.[42] Because there is an action pending in Scotland by the decedents' estates against the appropriate Scottish defendants, which lawsuit Piper and Hartzell have consented to join as codefendants, defendants argued, and the district court concluded, that it would be unfair and unduly burdensome for them to be subjected to both trials. Although the extra burden is readily apparent, the unfairness is not. The defendants state their point as follows:

> Defendants' inability to join [the Scottish] parties as defendants in this case would seriously prejudice Defendants, through exposure to unnecessary, duplicitous litigation, and inconsistent verdicts. If Defendants are found liable here, they will be forced to file an indemnity or contribution action in Scotland against these parties. In light of the fact that Pennsylvania and Scottish law differ greatly with respect to products liability, Piper faces the substantial possibility, and great prejudice, of being held liable on a products liability theory in this case but being forced to prove negligence in an indemnity or contribution action in Scotland. Even if the same standard of liability is applied in this action and in an

42. *See Gilbert*, 330 U. S. at 511; Fitzgerald v. Texaco, Inc., 521 F. 2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U. S. 1052 (1976).

> indemnity or contribution action in Scotland, Defendants run the substantial risk that different juries will find different facts and, hence, produce inconsistent results.[43]

If the defendants are found liable on strict liability here but must prove negligence against the air carrier to obtain indemnity, that is not unfair, but simply the result reached under the laws of the jurisdictions in which the two companies reside. The air taxi operates exclusively in Scotland and plans its operations and expenses according to Scottish law. Piper and Hartzell reside in strict liability jurisdictions, conduct most of their business in strict liability states, and plan accordingly.

The defendants' risk of inconsistent verdicts would only exist if neither Pennsylvania nor Scotland followed principles of res judicata. Under those principles, any subsequent verdict for plaintiffs would merge with a previous favorable judgment or be barred by a prior judgment against the plaintiffs.[44] Res judicata is clearly applicable in American jurisdictions and we may assume, in the absence of any affidavits or citations of Scottish law to the contrary, that it is followed in Scotland as well.[45]

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43. Brief of Appellee Piper at 22. Hartzell's argument on this point is simply conclusory:

> As is reinforced by the plaintiffs survivors action against the air carrier employing the pilot, the agency owning and maintaining the airplane and the estate of the pilot in Scotland, those parties should be joined as defendants and cannot be joined in the United States but could be joined in the proper Forum.

Brief of Appellee Hartzell at 13.

44. *See generally* Restatement (2d) Judgments §§ 47, 48, 68.1 (Tent. Draft No. 1, March 28, 1973).

45. Defendants submitted affidavits from Scottish counsel only on the following points of Scottish law: (1) choice of law, (2)

We therefore conclude that defendants' inability to implead other potentially liable parties would indeed make litigation here more burdensome, but defendants have not shown that it would also be unfair. It is properly a factor in their favor on the motion to dismiss, but it is not as weighty as they contend.

2. *Desirability of Viewing the Premises*

The district court concluded that, to the extent weight was to be assigned this factor, it favored defendants: "Familiarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles." [46]

It is unclear whether the trial judge in fact ascribed any significant weight to this element, and still more uncertain is what benefit a lay jury would obtain from observing the wreckage in deciding whether the plane crashed because the engine or propeller were incorrectly manufactured or the pilot was negligent. Furthermore, the topography of Scotland may, to the extent relevant, be readily proved by testimony.

D. *The Public Interest*

The parties in arguing this case, and the trial judge in deciding it, have placed the greatest importance on whether, under the applicable choice of law rules, American or Scottish law would apply to major aspects of the claims. The district court concluded that, for the most part, Pennsylvania law should apply to Piper and Scottish

45. (Cont'd.)
damages that may be awarded, (3) statutes of limitations, and (4) capacity to sue.

46. 479 F. Supp. at 734.

law to Hartzell.[47] Because application of different laws to the different defendants might confuse the jury, and because ascertainment of Scottish law would make the trial more difficult, the necessity of applying foreign law to a portion of the case was considered the "uppermost" factor favoring dismissal.[48]

As will be discussed below, we conclude that the district court erred in its choice of law determinations. But even if the district court were correct in its conclusion that a mixture of Scottish and American law would be required, dismissal would not have been justified under this Court's settled principles of forum non conveniens.

1. *The Necessity of Applying Foreign Law*

First, we held in *Hoffman v. Goberman* that "[i]t is settled that the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court. The district court was, therefore, in error in basing its action, in part at least, on this ground."[49] Although there may be cir-

47. The trial court opinion stated:

Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

479 F. Supp. at 734.

48. *See id.*

49. 420 F. 2d 423, 427 (3d Cir. 1970) (footnote omitted) (law of Netherlands Antilles involved); *accord* Mobil Tankers Co. v. Mene Grande Oil Co., 363 F. 2d 611, 615 (3d Cir.) (Venezuelan law), *cert. denied*, 385 U. S. 945 (1966); Burt v. Isthmus Dev. Co.,

cumstance in which the application of foreign law would present difficulties sufficient to favor dismissal—because of difficulties of translation or because the foreign law itself has principles unknown to our jurisprudence—we are not faced with such a case here.[50] Negligence principles are well-known on this side of the Atlantic and of course there will be no translation problems in dealing with Scottish law.

Second, if trial here would confuse the jury because a different country's law would apply to each defendant, that confusion would either not be eliminated by a trial in Scotland or would be eliminated only by unacceptable unfairness to the plaintiff. If, as is unlikely, a Scottish court as a "transferee" court would apply the same choice of law rulings as would the court here, it would have an equally difficult problem in applying the laws of different countries to different defendants. Dismissal here would not eliminate the difficulty, but only shift it to a foreign forum.

The district court, though, had the affidavit of Scottish counsel that Scotland's choice of law rule for torts was to apply the law of the place of injury to all facets of the case, and therefore Scotland probably would apply its own law to all claims. Even under the district court's choice of law analysis, requiring a mixture of American and Scottish law, it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But this Court has held that a dismissal for forum non

49. (Cont'd).

218 F. 2d 353, 357 (5th Cir.), *cert. denied*, 349 U. S. 922 (1955); *see* Founding Church of Scientology v. Verlag, 536 F. 2d 429, 436 (D. C. Cir. 1976) (difficulty in applying German law not sufficient).

50. 420 F. 2d at 427.

conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." [51] Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

2. *Choice of Law Rules Under* Klaxon and Barrack

As a federal court deciding a case premised on diversity jurisdiction, we are required by the *Klaxon* rule [52] to apply the conflicts of law rules of the state in which we sit. We are not permitted to fashion our own rules, however more clear or salutory they might seem.[53] Complicating matters here is that, for purposes of this litigation

51. De Mateos v. Texaco, Inc., 562 F. 2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U. S. 904 (1978). The point is made by Professor Bickel in terms of fairness to the plaintiff. *See*, Bickel, *supra* note 11, at 28 & n. 68 (because premise of forum non conveniens is existence of jurisdiction, "a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true").

52. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U. S. 487, 496 (1941).

53. The Supreme Court reaffirmed *Klaxon* in strong terms in Day & Zimmermann, Inc. v. Challoner, 423 U. S. 3, 4 (1975) (per curiam) (reversing appellate court determination that, as a matter of federal choice of law, a federal court could not apply the choice of law rule of the state in which it sat if that jurisdiction had no policy interest in the case). Thus the Court has, at least for now, answered scholarly criticism of *Klaxon* and exhortations that it be overruled. *See, e.g.*, Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 32-42 (1963); Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U. C. L. A. L. Rev. 1191 (1967); *cf.* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 713-18 (2d ed. 1973) (making point by rhetorical questions).

and its choice of law problems, we are in effect "sitting" in two different states. Moreover, though not entirely disinterested, each state is in the position of choosing between the laws of two other states.

The action against Piper was transferred under § 1404(a) from California to Pennsylvania. The law of the transferor forum—*i.e.*, California's choice of law rules—should therefore, under *Van Dusen v. Barrack*,[54] be applied as to Piper.

Hartzell's situation is more complex. The California district court ruled that personal jurisdiction over Hartzell was lacking, both under California law and the Due Process Clause. The court did not dismiss the case against

54. 376 U. S. 612 (1964). The *Barrack* rule—that a transfer should work no change in the applicable law—is a "general" one. the Court added this qualifier:

> [W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens* . . . .

Id. at 639-40 (footnote omitted). Piper does contend that California court would have dismissed this action on the ground of forum non conveniens. This is implicit in its argument that we should now dismiss the case on that ground and that California law on this issue is the same as the federal law on which the issue has generally been argued. Both Piper and Reyno agree, however, that California's choice of law rules govern the case as to Piper. To follow the Court's caveat would, moreover, be inefficient and wasteful of judicial resources, for it would require the transferee court, after the transferor court had granted a 1404(a) transfer, to examine the transferor State's law to ascertain whether the defendant should have brought a motion to dismiss rather than to transfer in the first place. *See In re* Air Crash Disaster at Boston, Massachusetts on July 31, 1973, 399 F. Supp. 1106, 1121-22 (D. Mass. 1975).

Hartzell, but rather quashed service of process and ordered transfer to Pennsylvania along with codefendant Piper. Although this Court has held that transfer under § 1404(a) is proper even though the transferor state lacked personal jurisdiction,[55] that does not resolve the problem whether the *Klaxon* and *Barrack* rules would still require us to apply the choice of laws rule of the transferor state.

To state the problem is, we believe, to explain why California's law may not apply to Hartzell: if California's exercise of jurisdiction would violate due process, so would application of that state's choice of law rules.[56] Furthermore, *Barrack* is not so rigid. The Court there stated as a *general* rule of statutory construction of § 1404(a) that, to be "in the interest of justice," a transfer should not work a change in the applicable law.[57] We conclude that this

55. In Goldlawr, Inc. v. Heiman, 369 U. S. 463, 466 (1962), the Supreme Court held that transfer for improper venue under 28 U. S. C. § 1406(a) was proper whether or not the court in which the motion was filed had personal jurisdiction over the defendants. *Cf.* Martin v. Stokes, No. 78-3390, slip op. at 5-6 (6th Cir. filed June 19, 1980) ("following a transfer under § 1406(a), the transferee district court should apply its own state law rather than the state law of the transferor district court") (citing cases). This Court applied *Goldlawr* by analogy to § 1404(a) and held that if lack of both venue and personal jurisdiction could not defeat a transfer, then want of the latter alone could not. United States v. Berkowitz, 328 F. 2d 358, 361 (3d Cir.), *cert. denied*, 379 U. S. 821 (1964).

56. *See* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94, 103 (1976) (forum must have reasonable due process basis for applying own law, which does not exist if party opposing application of forum's law has no minimum contacts with forum, the transaction giving rise to the claim is not connected with the forum, or application of the forum's law would otherwise be manifestly unfair).

57. The plaintiff in the *Barrack* case challenged, by writ of mandamus, the district courts order transferring the case from Pennsylvania to Massachusetts. He contended that the transfer

case comes within an exception, the possibility of which was noted in *Barrack*,[58] to the application of the transferor state's law. As with any other statute, we must construe § 1404(a) to avoid any constitutional problem,[59] and so hold that when there has been an interstate transfer without personal jurisdiction, the transferor state's choice of law does not apply to that defendant. Because Pennsylvania does have personal jurisdiction, it is that state in which the federal court is located for the *Klaxon* purpose of finding the choice of law rules governing the case as to Hartzell.

Our analysis so far does not differ from that of the district court, which held that California's choice of law rules applied to Piper and Pennsylvania's rules applied to Hartzell.[60] The court went on to hold that under California's governmental interest approach the Scottish law of wrongful death would apply to make Reyno an improper litigant, but Pennsylvania's law of strict liability rather than Scotland's negligence law would govern the theory

57. (Cont'd.)
could not be, as § 1404(a) requires, "in the interest of justice," because it was likely to be accompanied by a prejudicial change in the state law to be applied. 376 U. S. at 626. The distirct court had held that transfer could be ordered regardless of the possibility of a change in law, *id.* at 626-27, our Court agreed with the plaintiff that it could not, *see* Barrack v. Van Dusen, 309 F. 2d 953 (3d Cir. 1963), and the Supreme Court, disagreeing with both the trial and appellate courts, reversed. A transfer would not be unfair, it held, because "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." 376 U. S. at 639.

58. *See* note 54 *supra*.

59. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U. S. 490, 507 (1979).

60. 479 F. Supp. at 734.

of the tort.[61] Pennsylvania's significant contacts approach was thought to require that Scottish law apply to all facets of the claim against Hartzell.[62] We must examine these rulings to determine whether they are erroneous as a matter of law.

a. *California Conflicts Law Applied to Piper*

California was a pioneering state in the governmental interest analysis approach to choice of law that was developed by Professor Currie.[63] In *Reich v. Purcell*,[64] the California Supreme Court abandoned the traditional view that the law of the place of wrong (injury) must be applied in tort actions regardless of the issues, and established in its stead the principle that "[t]he forum must search to find the proper law to apply based upon the interests of the litigants and the involved states."[65]

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61. The district court relied primarily on Reich v. Purcell, 67 Cal. 2d 551, 432 P. 2d 727, 63 Cal. Rptr. 31 (1967); and Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P. 2d 666, 114 Cal. Rptr. 106 (1974), while mentioning in passing Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U. S. 859 (1976), 479 F. Supp. at 735-36.

62. *See* 479 F. Supp. at 736-37 (relying on Griffith v. United Airlines, 416 Pa. 1, 203 A. 2d 796 (1964); and Lewis v. Chemetron, 448 F. Supp. 211 (W. D. Pa. 1978)).

63. Professor Brainerd Currie is generally considered to be the father of modern governmental interest analysis. *See* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U. S. 859 (1976); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 Vand. L. Rev. 717, 720 (1980); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392, 392-93 (1980). Most of his writing on the subject is collected in B. Currie, Selected Essays on the Conflict of Laws (1963).

64. 67 Cal. 2d 551, 432 P. 2d 727, 63 Cal. Rptr. 31 (1967).

65. 67 Cal. 2d 553, 432 P. 2d at 729, 63 Cal. Rptr. at 33.

Also integral to the holding in *Reich v. Purcell* was the introduction into California law of the concept of "false conflicts."[66] In *Reich*, the wrongful death action arose from an automobile accident that occurred in Missouri between an Ohio plaintiff and a California defendant. Missouri, the state of injury, limited compensation for wrongful death, but neither California nor Ohio had any limitation. The California Supreme Court held that as to the issue of the extent of damages, as opposed to the standard of conduct on which liability was based, there was no true conflict in governmental interests. Since California had no limitation on damages, it had no interest in protecting its resident defendant from a higher recovery. Moreover, the defendant's California insurance policy would be calibrated to the potential burdens of larger claims. Missouri had an interest in the standard of conduct for behavior within its borders, but its interest in limiting damages was solely to protect in-state defendants. It had no substantial interest in extending that protection to defendants from states with no such limitations, and Ohio, as the state where the decedents' estates were probated, did have a substantial interest in unlimited recovery. Therefore, Ohio's law as to the damage issue was applied.[67]

66. The term was not explicitly used in that case, but the methodology was. *See id.* at 555-56, 432 P. 2d at 730-31, 63 Cal. Rptr. at 34-35, Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P. 2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U. S. 859 (1976).

67. Reich v. Purcell, 67 Cal. 2d 551, 432 P. 2d 727, 731, 63 Cal. Rptr. 31, 35 (1967), *see* Hurtado v. Superior Court, 11 Cal. 3d 574, 581-83, 522 P. 2d 666, 670-71, 114 Cal. Rptr. 106, 110-11 (1974) (false conflict between plaintiffs' state's limitation of damages and defendant's state's allowance of full recovery; full recovery allowed). The false conflicts methodology is also attributable to Professor Currie, as well as Professor Cavers, *see* B. Currie, *supra* note 62, at 189; D. Cavers. The Choice-of-Law Process 89-90 (1965), both of whom are extensively cited in *Hurtado*.

Subsequent cases indicate a further refinement of the governmental interest and false conflict methodology termed a "comparative impairment" approach.[68] This approach comes into practice only after a "'preliminary analysis has identified a true conflict of the government interests involved.'" Once this preliminary step is satisfied, the court resolves a true conflict by "'determin[ing] which state's interest would be more impaired if its policy were subordinated to the policy of the other state . . . . [T]rue conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied.'"[69]

Among the relevant factors to be considered in determining choice of law under California's comparative impairment approach are the following:

> (1) The status of the law—whether it is to be considered anachronistic or ascendant in the common law jurisdictions. "'If one of the competing laws is archaic and isolated . . ., it may not unreasonably have to yield to the more prevalent and progressive law, other factors of the choice being roughly equal.'"[70]

(2) Insurance and other planning for risks. Parties may be expected to plan their activities with in-

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68. Offshore Rental Co. Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P. 2d 721, 726, 148 Cal. Rptr. 867, 872 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d at 321, 546 P. 2d at 723-24, 128 Cal. Rptr. at 219-20 (1976).

69. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P. 2d 721, 726, 148 Cal. Rptr. 867, 872 (1978) (quoting *Bernhard, supra* note 68).

70. *Id.* (emphasis deleted) (quoting Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1216 (1946).

surance in mind, and that planning may affect the comparative fairness of two competing rules of liability.[71]

As we have mentioned, the district court divided the case against Piper into distinct issues, and ruled that a California court would apply its law as to one and Scottish law as to others. He then employed what conflicts scholars refer to as *depecage*, defined as "the process of applying the rules of different states to determine different issues in the same case." [72] Although the California Supreme Court has not explicitly adopted this method, it is implicit in that court's analysis of cases and it is consistent with modern governmental interest analysis to examine comparative governmental interests as to each issue, to the extent the issues are separable and the balance of comparative interests may vary.[73] We shall therefore examine separately the issues identified by the parties and the district court: the standard of liability, damages for wrongful death, and the capacity of the plaintiff to bring a wrongful death suit as a representative.

Any asserted conflict between American strict liability and Scottish negligence law is, we believe, a false one. Two basic policies underly theories of tort liability: deterrence of harm-causing conduct and compensation of persons injured by that conduct. In private tort law, in which civil rather than criminal liability is imposed, the

71. *Id.* at 167, 583 P. 2d at 734, 148 Cal. Rptr. at 872.

72. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58, 75 (1973); *see* Broome v. Antler's Hunting Club, 595 F. 2d 921, 923 (3d Cir. 1979); R. Leflar, American Conflicts Law § 109, at 221-22 (3d ed. 1977).

73. *See* R. Leflar, *supra* note 72, at 222; Reese, *supra* note 72, at 75. The approach is also implicit in the analysis of Professor Cavers, whose work is often cited by the California Supreme Court. *See* D. Cavers, *supra* note 67, at 40-43.

deterrent function is accomplished by compensation of the plaintiff. The choice between holding a manufacturer liable only for negligence and holding it strictly liable for any dangerous products or design is, practically speaking, a matter both of searching for optimal deterrence of harmful conduct and of allocating the costs of injuries either to producers or consumers. A negligence standard is, broadly speaking, more protective of producers, while strict liability is more solicitous of consumers.

The perceived conflict in this case is between Scotland's interest in encouraging industry by protecting manufacturers and making it relatively more difficult for consumers to recover. Pennsylvania, by contrast, in adopting strict liability, has shifted some of the burdens of injuries from consumers to producers. By adopting this policy of increased deterrence, it hopes to make manufacturers more careful in production and design than they would be if held to a negligence standard.[74]

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74. In a recent case in which the California Supreme Court adopted comparative negligence into strict liability, the underlying policy of the latter was said to be to shift the cost of injuries from defective products from consumers to manufacturers. But the court emphasized that strict liability is not absolute liability and does not make the manufacturer an insurer of his product's safety. Daly v. General Motors Corp., 20 Cal. 3d 725, 733, 575 P. 2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978). In addition to spreading the costs of accidents, strict liability is intended to increase a manufacturer's incentive to produce safe products. *See id.* at 737-38, 575 P. 2d at 1169, 144 Cal. Rptr. at 387. *See* Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L. J. 656 (1975) (strict liability better serves goal of optimal deterrence—minimization of accident and prevention costs); Calabresi & Hirschoff *Toward a Test for Strict Liability in Torts*, 81 Yale L. J. 1055, 1074-84 (1972) (shift from negligence to strict liability cannot be explained simply in terms of better distribution of costs; strict liability's appeal is also in greater deterrence of harmful conduct); *cf.* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1121, 1122

Applying Pennsylvania's strict liability standard to its resident manufacturer would serve that state's interest in the regulation of manufacturing. Scotland's interest in encouraging industry within its borders would not be impaired, however, by applying a stricter standard of care on a foreign corporation which has no industrial operations in Scotland. Furthermore, Scotland would have to interest in *denying* compensation to its residents for the purpose of benefiting a foreign corporation. Finally, imposition of strict liability on Piper cannot be said to be unfair to it. Inasmuch as Pennsylvania, the state in which Piper makes its product, and the vast majority of American jurisdictions in which most of Piper's aircraft are sold and fly, have strict liability,[75] that is the legal standard under which it plans its operations.

Pennsylvania's interest in deterring defects in products can be served without impairing any significant interest of Scotland. Application of Scotland's negligence law would only harm resident beneficiaries without any countervailing benefit to its industrial economy. We therefore conclude that, as between Pennsylvania and Scottish law on this issue, a California court would apply Pennsylvania's strict liability standard. Similar considerations would govern any greater restrictions on recovery for wrongful death that Scotland may have.[76]

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74. (Cont'd.)

(1980) (one argument that has convinced courts is that supplier of goods should be responsible for the harm they cause, regardless of fault).

75. *See, e.g.*, Wade, *On Product "Design Defects" and Their Actionability*, 33 Vand. L. Rev. 551, 555 (1980) (major point of controversy in America is no longer whether strict liability should be adopted, but what its precise standards should be).

76. Courts employing governmental interest analysis have not struggled long to determine that a state where plaintiff but not defendant resides has no interest in restricting recovery for wrongful death of its citizens against foreign corporations. *See, e.g.*, Hurtado

The district court declined to make any definitive ruling on the issue of plaintiff's capacity to sue because of the paucity of available information for balancing comparative governmental interests. 479 F. Supp. at 735. There was thought to be no need to decide this question, because the court concluded for other reasons that the action should be dismissed and brought anew in Scotland.[77]

Because we reverse the dismissal, it will be necessary for the trial judge to decide that issue based upon additional information. If it is held that Reyno does not have representative capacity, it will be necessary to allow a substitution of parties so that the decedents' estates can bring the action directly. Such a substitution would not destroy diversity and should be granted in the interests of justice.[78]

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76. (Cont'd.)

v. Superior Court, 11 Cal. 3d 574, 522 P. 2d 666, 114 Cal. Rptr. 106 (1974); *Cf.* Rosenthal v. Warren, 475 F. 2d 438 (2d Cir.) (applying New York government interest analysis; New York forum would apply its own unlimited recovery rather than limitation of state of defendant where all tortious conduct occurred), *cert. denied*, 414 U. S. 856 (1973); Kuhne, *Choice of Law in Products Liability*, 60 Calif. L. Rev. 1, 28 (1972) ("Under a governmental-interest approach, [a] proplaintiff tendency will be conceptualized . . . by imputing a greater state interest to recovery law than to those refusing recovery.")

77. On the choice of law issue as to representative capacity, the court stated: "We . . . only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make . . . any defnitive ruling on the purpose of the Scottish law or thereby the choice of law." 479 F. Supp. at 735. It later concluded only that "it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation Plaintiff would not be a proper litigant." *Id.* at 736.

78. Fed. R. Civ. P. 17(a); *see* Field v. Volkswagenwerk AG, No. 79-1710, slip op. at 24-25 (3d Cir. July 10, 1980).

Guiding the trial judge's decision should be the requirement of Fed. R. Civ. P. 17(b) that the capacity of an individual to sue in a representative capacity "shall be determined by the law of the state in which the district court is held."[79] In addition to examining the laws of California and Pennsylvania to determine whether Reyno has representative capacity,[80] the trial court should consider whether the defendants' challenge to the plaintiff's capacity to sue has come too late in the litigation.[81]

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79. Rule 17(b) in full provides:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held,* except [(1) a special rule for partnerships and other unincorporated associations; and (2) bankruptcy receivers].

(emphasis added); *see* General Heat & Power Co. v. Diversified Mortgage Investors, 552 F. 2d 556, 557 n. 1 (3d Cir. 1977) (suggesting that Rule 17(b) encompasses the state's conflict of law rules under *Klaxon*); Jacobs v. Adams, 601 F. 2d 176, 178-79 (5th Cir. 1979) (applying conflicts of laws rule to determine scope of power or right to bring suit).

80. The court "is held" in California as to Piper and in Pennsylvania as to Hartzell. *See* pp. 24-26 *supra.*

81. Fed. R. Civ. P. 9(a) requires that a party desiring to raise an issue as to "the capacity of any party to sue . . . or the authority of a party to sue . . . in a representative capacity . . . do so by specific negative averment." The federal rules do not make clear when in the stage of a litigation lack of capacity must be averred, but because lack of capacity is a dilatory defense, Professors Wright and Miller state that it "should be raised promptly. Any unreasonable delay may encourage the court to deny the objection on the ground of prejudice." 6 C. Wright & A. Miller, Federal Practice and Procedures § 1542, at 640 (1971) (footnote omitted). *See* 5 *Id.* § 1295, at 397 (objection to party's capacity should be analo-

b. *Pennsylvania Conflicts Law Applied to Hartzell*

Citing *Griffith v. United Airlines,*[82] the district court applied the "significant contacts" approach to determine that Scotland's standard of liability, rather than that of Ohio or Pennsylvania, applied to Hartzell.[83] But a close examination of *Griffith* and, more importantly, subsequent elaborations by the Pennsylvania Supreme Court reveals that Pennsylvania's approach to choice of law is quite similar, at least for purposes of this litigation, to that of California. Pennsylvania first looks to identify and thus avoid false conflicts, and then, when a true conflict is present, exmaines and compares the competing governmental interests.

In *Griffith,* the Pennsylvania Supreme Court overturned the old rule that the law of the state of wrong governs all issues in tort actions,[84] but it did not specifically set forth the contours of that rule's replacement. In fact,

81. (Cont'd.)
gized to an affirmative defense and waived if not asserted early in the litigation by motion or responsive pleading). The record reveals that Reyno's capacity was not challenged by Piper until it joined Hartzell's motion to dismiss after the case had been transferred to the Middle District of Pennsylvania. This motion came after Piper had moved to remove the case from a California state court to a federal court, had filed its answer to the complaint, and had successfully moved to transfer the case to the Middle District of Pennsylvania.

82. 416 Pa. 1, 203 A. 2d 796 (1964).

83. 479 F. Supp. at 736-37. All three jurisdictions have contacts with or interests in the alleged tort. Scotland is the residence of the decedents and the place of the fatal crash. Hartzell manufactured the allegedly defective propeller in Ohio and it was assembled into the Piper aircraft in Pennsylvania.

84. 416 Pa. at 21-23, 203 A. 2d at 805-06.

as the court later indicated, once governmental interests were examined *Griffith* involved a false conflict situation.[85] The state in which an airplane crashed was held to have no interest in enforcing its limitation of damages for wrongful death when neither party was a resident.[86]

The Pennsylvania Supreme Court noted three general approaches competing to replace the old rule: (1) Professor Currie's early emphasis on applying the forum's law when the forum has a legitimate interest in the issue presented;[87] (2) Professor Ehrenzweig's stress on the interests of the parties, specifically looking to whether the defendant would have planned by insurance for the risks to which he would be exposed by the applicable law;[88] and (3) the "significant contacts" approach of the Restatement (Second) of Conflicts, under which a court applies the law of the state with the most significant relationship with the occurrence and the parties.[89] Rather than choose among these alternative approaches, the Pennsylvania Supreme Court adopted what it believed was the essence of all three: "a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court."[90]

Subsequent cases confirm that Pennsylvania courts follow a governmental interest analysis approach, with a

85. Kuchinic v. McCrory, 422 Pa. 620, 624 & n. 4, 222 A. 2d 897, 899 n. 4 (1966).

86. *Griffith*, 416 Pa. at 24, 203 A. 2d at 807.

87. *Id.* at 14, 203 A. 2d at 802 (citing Currie, *Comments on* Babcock v. Jacksons, 63 Colum. L. Rev. 1212, 1233 (1963)).

88. *Id.* (citing Ehrenzweig, *Comments on* Babcock v. Jackson, 63 Colum. L. Rev. 1212, 1243 (1963)).

89. *Id.* at 14-15, 203 A. 2d at 802-03 (citing Restatement (2d) Conflict of Laws §§ 379, 389a (1971) and writings of its Reporter, Professor Reese).

90. *Id.* at 21, 203 A. 2d at 805 (footnote omitted).

state's contacts being considered significant only when the behavior giving rise to the contact furthers or abrogates a state policy. Where the place of accident is fortuitous and the state where the accident occurred has no interest in the regulatory standard at issue, any conflict between that state and a state truly interested because, for example, it constituted the residency of the parties is, Pennsylvania appears to suggest, a false one.[91]

In *McSwain v. McSwain*, the court stated its approach as follows:

> Whether the policies of one state rather than another should be furthered in the event of conflict can only be determined within the martix of specific litigation. What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.[92]

The latest discussion in *Cipolla v. Shaposka* [93] summarized the approach of the three cases discussed above as calling upon the court to determine which state "has the greater interest in the application of its law to the question now before us." Moreover,

> In determining which state has the greater interest in the application of its law, one method is to see what contacts each state has with the accident, the contacts being relevant only if they relate to the "policies and interests underlying the particular issue before the court." When doing this it must be re-

91. Kuchinic v. McCrory, 422 Pa. at 624 & n. 4, 222 A. 2d at 899 & n. 4.

92. McSwain v. McSwain, 420 Pa. 86, 94, 215 A. 2d 677, 682 (1966) (citing *Griffith*, as well as California and New York cases).

93. 439 Pa. 563, 565, 267 A. 2d 854, 855 (1970).

> membered that a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale.[94]

These cases indicate to us that the primary approach of the Pennsylvania Supreme Court in choice of law is governmental interest analysis. Our determination as to whether the Pennsylvania court would apply American strict liability and unlimited recovery for wrongful death, rather than the negligence and damage limitations law of Scotland, therefore follows our prediction of California law. Indeed, the district court ruled that American standards of liability would control under governmental interest analysis applied as to California.[95] It is apparent,

94. *Id.* at 566, 267 A. 2d at 856 (quoting *Griffith*, 416 Pa. at 21, 203 A. 2d at 805).

95. There is some difference between California and Pennsylvania, on the one hand, and Ohio on the other as to the standard of proof in strict liability. Ohio has adopted in full Restatement (2d) Torts 402A, subjecting to liability one who sells a product in a defective condition "unreasonably dangerous." *See, e.g.*, Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N. E. 2d 267, 168 (1977) (Syllabus by the Court); *cf.* Anton v. Ford Motor Co., 400 F. Supp. 1270, 1273-76 (S. D. Ohio 1975) (reviewing products liability decisions of the Ohio Supreme Court). Pennsylvania and California have removed the "unreasonableness" requirement as being inconsistent with the policy of strict liability. *See e.g.*, Barker v. Lull Eng. Co., Inc., 20 Cal. 3d 413, 423-27, 573 P. 2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A. 2d 1020 (1978). Indeed, our Court in interpreting Pennsylvania law has repeatedly held that use in a jury charge of the Restatement 2d's "unreasonably dangerous" language is reversible error. *E.g.*, Matlocks v. Daylin, Inc., 611 F. 2d 30 (3d Cir. 1979); Bailey v. Atlas Powder Co., 602 F. 2d 585 (3d Cir. 1979). Giving separate charges on the Ohio standard for Hartzell and the Pennsylvania standard for Piper need not necessarily confuse the jury.

then, that the district court erred in concluding that foreign law would govern a substantial part of the case, and it is likewise apparent that the choice of law factor weighted heavily in favor of dismissal for forum non conveniens.

E. *Other Elements of Public Interest*

We have held that under the applicable choice of law rules, Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute. It follows that any other public interest factors that should be considered under the Supreme Court cases of *Gilbert* and *Koster* favor trial in this country rather than Scotland.

III. Conclusion

Because the defendants did not meet the burden required of them for a forum non conveniens dismissal, the judgment of the district court will be reversed and the cause remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

---

(D. C. Civil No. 77-1159)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel, on May 22, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 19, 1979, be, and the same is hereby reversed and the cause is remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

/s/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

July 24, 1980

ORDER OF THE COURT OF APPEAL SUR PETITION FOR REHEARING EN BANC

Filed August 27, 1980
[caption omitted in printing]

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Appellee, Hartzell Propeller, Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ ARLIN M. ADAMS
Arlin M. Adams
Circuit Judge

Dated: August 27, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehily, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,

Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
C. A. No. 77-1159

Argued May 22, 1980
Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the slip opinion filed July 24, 1980 in the above matter be and is hereby amended as follows:
Page 7, first paragraph
should read:

At the time of the transfer motion, critical facts such as where various witnesses are, where the crash occurred, where the wreckage was located, and who owned the plane, were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum non conveniens motion, they are hardly surprising or significantly new.

BY THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: September 15, 1980

Supreme Court, U. S.
FILED
DEC 29 1980
MICHAEL RODAK, JR., CLERK

No. 80-883 (Hartzell)
No. 80-848 (Piper)
IN THE

Supreme Court of the United States

October Term, 1980

HARTZELL PROPELLER, INC., a Corporation,
and
PIPER AIRCRAFT COMPANY, a Corporation,
Petitioners,

vs.

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott,
Respondent.

Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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Question Presented.

Was the decision of the United States Court of Appeals for the Third Circuit prejudicial to Petitioners and disruptive of federal law, such that this Court must intervene to reverse that decision?

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No. 80-883 (Hartzell)
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IN THE

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October Term, 1980

HARTZELL PROPELLER, INC., a Corporation,
and
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Petitioners,

vs.

GAYNELL REYNO, as Personal Representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott,
Respondent.

Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Statement of the Case.

On July 27, 1976, a Piper Model TA-23 aircraft crashed near Talla, Scotland. There were no witnesses to the aircrash itself and all aboard were killed on impact. Although some inconsistencies remain regarding the cause of the aircrash, it has become clear that prior to the crash an engine and resulting propeller malfunction occurred. Plaintiff below, the personal representative of the heirs of the deceased passengers on the plane, has therefore asserted various claims

arising out of the crash based on strict products liability and negligence against the defendants.

The defendants herein are both incorporated and conduct business almost exclusively within the United States. The aircraft which crashed was manufactured in the United States, and the plaintiff was before the honorable courts of the State of Pennsylvania precisely because of defendants' prior insistence, in the context of formal motions, that said state represents the most appropriate forum for the resolution of this dispute.

The initial action for damages was filed in 1977 in the Los Angeles, California Superior Court. Subsequently, defendant PIPER AIRCRAFT COMPANY and another defendant, later dismissed, (AVCO LYCOMING ENGINE GROUP), filed a Petition for Removal to the United States District Court of the Central District of California. That petition was granted.

Petitioner HARTZELL thereafter filed a Motion to Dismiss for lack of in personam jurisdiction and for a transfer pursuant to 28 U.S.C. §1404(a) to the Court of Pennsylvania. In September 1977, Petitioner PIPER filed a Motion to Dismiss for failure to state a claim upon which relief may be granted and to strike the plaintiff's claim for punitive damages.

In November, 1977, a motion was filed by PIPER for transfer under 28 U.S.C. §1404(a) to the United States District Court for the Eastern District of Pennsylvania. The request to transfer the case to the *Eastern* District was subsequently discovered to be inadvertent and when the court granted the motion to transfer, the Order stated that the matter was actually to be taken in the *Middle* District of Pennsylvania.

The action was then commenced for a third time in Pennsylvania. There followed motions by Petitioner HARTZELL for dismissal on the ground of forum non conveniens, and by Petitioner PIPER for Judgment on the Pleadings or for Summary Judgment.

On October 19, 1979, the Court, after lengthy filings from all parties pursuant to the above motions, ordered the action dismissed on the ground of forum non conveniens, conditioned upon defendants' submission to the jurisdiction of the courts of Scotland, and their waiver of any statute of limitations defense in that country.

Subsequently, plaintiff REYNO appealed from the judgment of the District Court to the United States Court of Appeals for the Third Circuit. On July 24, 1980, that Court reversed the District Court, and on August 27, 1980, denied HARTZELL's Petition for a rehearing *en banc*. Thereafter, both HARTZELL and PIPER filed the within Petitions for Writs of Certiorari.[1]

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[1]Respondent herein, for the convenience of the Court and the parties, responds to both petitions with this single opposition.

ARGUMENT.

A thorough reading of both of the petitions submitted herein indicates that Petitioners have too narrowly construed the opinion of the U.S. Court of Appeals for the Third Circuit, so as to lend to it an interpretation which revolves solely around the issues of the prospective result of the application of one forum's law over another and the plaintiff's choice of forum.

Respondent respectfully submits that the analysis made by the Court of Appeals was pervasive and thorough, and clearly not limited to the two factors which Petitioners have elected to bring to the attention of this Court.

> WAS THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PREJUDICIAL TO PETITIONERS AND DISRUPTIVE OF FEDERAL LAW, SUCH THAT THIS COURT MUST INTERVENE TO REVERSE THAT DECISION?

Petitioners have demonstrated an overriding concern with the proposition that the Court of Appeals placed undue emphasis on the less favorable aspects of Scottish liability laws as they would apply in this matter, as opposed to the more liberal American law of products liability which would be applied in the U.S. District Court in Pennsylvania. The Court of Appeals reversed the District Court and held that a dismissal by the American court would result in a change of applicable law, the very prospect of such a change and its consequences thereby precluding dismissal. The court noted as follows:

> Even under the district court's choice of law analysis . . . it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But this Court has held that a dismissal for forum non

> conveniens, like a statutory transfer, should not, despite its convenience, result in a change in the applicable law. Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.[2]

This holding was initially enunciated in *DeMateos v. Texaco, Inc.*[3] which reflected the landmark decision of *Van Dusen v. Barrack*[4] by this Court that a transfer under 28 U.S.C. §1404(a) should not work a change in applicable law as determined by the transferor court.

The *DeMateos* court held that the "principle is no less applicable to a dismissal on forum non conveniens grounds."[5]

Summarily, and without any support whatsoever for its contention, Petitioner HARTZELL stated in footnote 25 at page 7 of its Petition that "[t]he stance taken in *DeMateos* is the result of misapplication of the principle of *Van Dusen v. Barrack*". This conclusion is unwarranted, especially in view of the fact that *Van Dusen* took up the matter of prejudice to a plaintiff, and held that the ruling of the District Court below

> assumed that transfer to a more convenient forum may be granted on a defendant's motion even though that transfer would seriously prejudice the plaintiff's legal claim.[6]

The *Van Dusen* decision also went on to state:

> Although in the present case the contentions concern rules relating to capacity to sue and damages, in other

---

[2]*Reyno v. Piper Aircraft Co.*, 630 F.2d at 163-164 (3d Cir. 1980).
[3]562 F.2d 895, 899 (3d Cir. 1977), cert. den. 435 U.S. 904 (1978).
[4]376 U.S. 612, 626-43 (1964).
[5]562 F.2d at 899.
[6]376 U.S. at 627.

> Although in the present case the contentions concern rules relating to capacity to sue and damages, in other cases the transferee forum might have a shorter statute of limitations or might refuse to adjudicate a claim which would have been actionable in the transferor State. In such cases a defendant's motion to transfer would be tantamount to a motion to dismiss.[7]

This Court concluded that the potential prejudice to the plaintiff therein was so substantial as to require review of the assumption that a change in state law is permissible under a 28 U.S.C. §1404(a) transfer, stating that

> There is nothing . . . in the language or policy of §1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.[8]

Both Petitioners contend that *DeMateos*, in addition to being a misapplication of federal law as enunciated by this Court, also conflicts sorely with the position on this issue of the Court of Appeals for the Second Circuit, and rely on *Fitzgerald v. Texaco, Inc.*[9] in support thereof. Petitioners' reliance is misplaced.

Fitzgerald concerned a maritime collision off the Dover Straits of England. The only connection with the U.S. in this matter was that a Delaware corporation (Texaco, Inc.) owned all of the stock of the foreign company which owned (but did not manage) the vessel, and was also the thrice removed owner of the foreign company (TOT) which managed the vessel.[10] Other than such a tenuous link with America, this case had absolutely no connection with the United States courts, and the Court therein was justified in

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[7]376 U.S. at 629-30.
[8]376 U.S. at 633-34.
[9]521 F.2d 448 (2d Cir. 1975), cert. den. 423 U.S. 1052 (1976).
[10]This lineage is obtained from *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977).

holding that England was by far the more convenient forum. The decisive factors were far more compelling in that case than in the present one, including the fact that there were witnesses to the collision itself, and those witnesses resided in England.

In addition, not one individual resident of the United States could be shown to have any responsibility for the events surrounding the collision. In the present case, antithetically, there has been posited by plaintiff strict liability on the part of two domestic corporations, with no intervening causative organizations or individuals. Therefore, all the witnesses and documentary evidence relating to the plaintiff's claims reside in the United States and near the Pennsylvania forum. These include witnesses and documents on the design, manufacture, testing, certification and approval of the aircraft. Petitioners' therefore, have asserted a conflict which Respondent submits does not really exist, since it might be hypothetically assumed that the Second Circuit, given the extensive contacts between the matter extant and the United States, would resolve the question in the same manner as the Third Circuit. Rhetorical though the question may at present be, the fact of the extensive analysis by the Third Circuit panel remains to discredit the conflict between the Circuits as alleged by Petitioners, and Petitioners have completely neglected the extensive balancing of factors undertaken and completed herein by the Third Circuit Court. Furthermore, this Court has to date declined to comment on such an alleged discrepancy between the Circuits[11] without the resulting confusion of federal law which Petitioners so strenuously fear.

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[11]Certiorari was denied in *DeMateos v. Texaco, Inc.* at 435 U.S. 904 (1978); Certiorari was previously denied in *Fitzgerald v. Texaco, Inc.* at 423 U.S. 1052 (1976).

Petitioners also expressed grave concern over the purportedly undue weight given by the Third Circuit to the plaintiff's choice of a forum, one of the factors enumerated in *Gulf Oil Corp. v. Gilbert*[12] to be weighed by courts faced with forum non conveniens dismissal issues.

It must be reiterated at the outset that this concern on the part of Petitioners reflects a narrow interpretation of the actual balancing of many factors carried out by the Court of Appeals. The Court's opinion clearly demonstrates an almost overly thorough analysis of every single element outlined in the *Gilbert* case,[13] and Petitioners' respective analyses have unnecessarily and unjustifiably narrowed the parameters of the forum non coveniens doctrine.

It is well established that a plaintiff's choice of forum, given proper venue, is rarely to be disturbed in the absence of a compelling showing that a defendant, by being taken to trial in that forum, will be vexed, harassed, and subject to such undue burden so as to violate all notions of fairness in the trial process.[14]

Further, after the balancing process is carried out pursuant to *Gilbert*, the trial court must find the result more than merely leaning in favor of the defendant; such result must be strongly in favor thereof. In the absence of such an outcome, the plaintiff's choice of forum is not to be disturbed,[15] and both Petitioners have failed to demonstrate that the balance is strongly in their favor or that they would suffer undue hardship and prejudice if put to trial in the United States. Rather, as Respondent maintained before the

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[12]330 U.S. 501 (1947).

[13]*Reyno v. Piper Aircraft Co.*, 630 F.2d at 159-171. It should be noted that pp. 163-171 primarily concern the Court's choice of law discussion.

[14]*Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947).

[15]330 U.S. at 508.

Court of Appeals, Petitioners would merely have this Court exchange the convenience of Respondent in the prosecution of this matter for that of their own, all the while ignoring the major contacts between the accident herein and the site of the tortious conduct by Petitioners.

Respondent would also respectfully remind this Court that not only has the U.S. been chosen as a forum by her, but it was previously strenuously argued by Petitioners in California as a convenient forum as well.[16]

Further, the inescapable fact remains that both Petitioners reside and do business almost exclusively in the United States, and cases were cited by the Third Circuit in support of the proposition that suit brought in a forum which not only represents the plaintiff's choice, but also the residence of the defendant, weighs heavily against dismissal.[17]

In *Top Form Mills v. Sociedad Nationale Ind., Etc.*,[18] the Court was faced with much the same situation as the one extant, the party seeking a forum non conveniens dismissal urging that trial would more suitably be held in Italy. The court rejected this contention, noting:

> The fact that witnesses located in Italy may have to be called here to testify at some expense and inconvenience similarly does not compel dismissal. Trial in Italy would require [the responding party] to shoulder the equally onerous burden of transporting its witnesses to that country . . . and [re Italian witnesses] if necessary examination in Italy by letters rogatory may be possible.[19]

---

[16]*Reyno v. Piper*, 630 F.2d at 156.

[17]*Ibid.*, at 12, citing *Schertenleib v. Fraum*, 589 F.2d 1156, 1164 (2d Cir. 1978); Hoffman v. Goberman, 420 F.2d 423, 426-27 (3d Cir. 1970).

[18]428 F.Supp. 1237 (S.D.N.Y. 1977).

[19]428 F.Supp. at 1253. See also *Thomson v. Palmieri*, 355 F.2d 64, 66 (2d Cir. 1966).

Finally, with respect to nearly every other *Gilbert* factor, it may be seen that the balance was carefully considered by the Court of Appeals and found to lean heavily in favor of Respondent herein. Petitioners below failed to meet the substantial respective burdens required of them to show that the relevant factors of convenience weigh clearly in their favor.[20] For Petitioners now to assert that the Court of Appeals inappropriately limited its consideration to that singular factor dealing with the weight to be given the plaintiff's choice of a forum, represents an erroneous circumscription of the Court of Appeals' decision.

Conclusion.

Because of the assertion of a false conflict by Petitioners, and because of the narrow construction given by them to the decision of the Third Circuit, Respondent respectfully prays that the within Petitions for Writs of Certiorari be denied.

Respectfully submitted,

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---

[20] *Data General Corp. v. Skinner*, 438 F.Supp. 901 (Del. 1977); *National Super Spuds, Inc. v. New York Mercantile Exchange*, 425 F.Supp. 665 (D.C.N.Y. 1977); *First Nat. City Bank v. Nanz, Inc.*, 437 F.Supp. 184 (D.C.N.Y. 1975).

Office-Supreme Court, U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-848 and 80-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PIPER AIRCRAFT COMPANY, *Petitioner,*

v.

GAYNELL REYNO

HARTZELL PROPELLER, INC., *Petitioner,*

v.

GAYNELL REYNO

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Whether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation.[1]

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[1] Respondent Gaynell Reyno, who brought this action as personal representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, was the appellant in the court of appeals below. The appellees were petitioner Piper Aircraft Company and Hartzell Propeller, Inc., the petitioner in No. 80-883. Piper Aircraft Company is a subsidiary of Bangor Punta Corporation; it has no subsidiaries or other affiliates itself.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-848 and 80-883

Piper Aircraft Company, *Petitioner,*

v.

GAYNELL REYNO

HARTZELL PROPELLER, INC., *Petitioner,*

v.

GAYNELL REYNO

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR PETITIONER PIPER AIRCRAFT COMPANY

OPINIONS BELOW

The opinion of the court of appeals is reported at 630 F.2d 149 (3d Cir. 1980). The opinion of the district court is reported at 479 F. Supp. 727 (M.D. Pa. 1979).

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. A timely petition for rehearing was denied on August 27, 1980. The judgment was amended by order dated September 15, 1980. The petition for a writ of certiorari was filed on November 25, 1980, and granted on February 23, 1981. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATEMENT

1. This case arises out of the crash of a small chartered aircraft in a mountainous region of Scotland on July 27, 1976. J. A. A66, A95.[2] The pilot and all five passengers were killed in the crash. J. A. A66, A70. The passengers all were Scottish citizens and residents, as are their heirs and next of kin. J. A. A67-A68.

The aircraft, a Piper Aztec, was registered in Great Britain and owned and maintained by Air Navigation and Trading Co., Ltd., a Scottish concern. J. A. A69, A70, A74. "The plane was owned, operated, maintained and serviced by the Scottish owner for several years preceding the accident . . ." J. A. A69. At the time of the accident, the aircraft had been leased to and was being operated by another Scottish company, McDonald Aviation, Ltd. *Id.*

The pilot of the aircraft, also a Scottish citizen and resident, was 22 years of age and had obtained his commercial pilot's license less than three months earlier. J. A. A69, A115. He had never flown the aircraft before. J. A. A113. Immediately before the crash, the aircraft was flying over high ground at considerably less than the minimum flight altitude required by the applicable operations manual. J. A. A113-A114. The aircraft developed a spin and crashed, even though "an experienced pilot would have been able to arrest any spin which developed . . ." J. A. A115. "[T]here is no doubt that had [the pilot] been flying higher above the ground there would have been more time available for him to recover from the spin." J. A. A114.

The British Department of Trade Investigation investigated the accident shortly after it occurred. J. A.

[2] "J. A." refers to the Consolidated Joint Appendix.

A69. At the conclusion of this investigation, the appellate board of inquiry determined that although "[a]ll four nuts securing the port propeller governor unit were [found to be] loose [after the accident]," J. A. A99, there was "no mechanical explanation for the aircraft developing a spin, other than possible rough running of the port engine which may have induced the pilot to reduce power . . ." J. A. A116.

2. Respondent Gaynell Reyno instituted this action for damages in July, 1977, in the Superior Court of the State of California, County of Los Angeles. Respondent, who "is a citizen and resident of California and is not related to the decedents," J. A. A69, brought the action as the "personal representative" of the estates of five of the deceased passengers. *Id.* Petitioner Piper Aircraft Company ("Piper"), which had manufactured the aircraft in Pennsylvania in 1968, and Hartzell Propeller, Inc. ("Hartzell"), which had designed and manufactured the aircraft's propellers in Ohio,[3] were named as defendants. *See* J. A. A23, A38, A69.[4] Respondent asserted both strict product liability and negligence as grounds for recovering damages. J. A. A66.

The action was immediately removed to the United States District Court for the Central District of California pursuant to 28 U.S.C. §1441. J. A. A68. Hartzell thereupon moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the action. J. A. A2-A3. Piper also move to transfer. J. A. A4. The district court, on December 21, 1977, found that it lacked jurisdiction over Hartzell and transferred the action in

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[3] Hartzell is the petitioner in No. 80-883, which has been consolidated with this case.

[4] The action subsequently was dismissed as to a third defendant, Avco Lyoming Engine Group. *See* J. A. A24, A119.

its entirety to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. §1404(a). J. A. A4-A5.

3. On May 15, 1978, Piper and Hartzell each moved to dismiss the action on the ground, *inter alia*, of *forum non conveniens*. J. A. A6-A12, A13-A20. After extensive briefing and oral argument, the district court dismissed the action on October 19, 1979, subject to the condition "that the Defendants shall waive any statute of limitations defense that they may have in the courts of Scotland and that they submit to the jurisdiction of the courts of Scotland . . ." J. A. A89.

The district court took as its guide the factors relating to private and public interests set forth by this Court in *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947):

> The factors pertaining to the private interests of the litigants are the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* at 508. The public factors bearing on the question include the administrative difficulties flowing from court congestion, an interest in having local controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the Court, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509.

J. A. A70-A71. The court proceeded to consider each of these factors.

After noting that an alternative forum in Scotland was open to respondent, J. A. A72, the district court "turn[ed] to the important factor of Plaintiff's choice of forum." *Id.* The court observed that "the Plaintiff is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law," J. A. A73, and that "the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." *Id.* Accordingly, the court concluded that, in this case, the "plaintiff's choice of forum is entitled to little weight." J. A. A74.

The district court then determined that the factors relating to private interests point to Scotland as the appropriate forum:

> The connections with Scotland are overwhelming, the real parties in interest are citizens of Scotland, the decedents were all citizens of Scotland, the investigation of the accident occurred in Scotland, the aircraft was owned, operated, and maintained by a Scottish company, the pilot was Scottish, the wreckage remains in the possession of the foreign authorities, nearly all witnesses needed for the defense of this suit are located in Scotland, and all witnesses to damages are located in Scotland.

J. A. A74. In particular, the court noted that "witnesses regarding the maintenance of the aircraft are in Great Britain, witnesses concerning the training of the pilot are located there, and witnesses relating to the investigation of the accident are in the British Isles," J. A. A75, and that "[f]amiliarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane

would be aided by a trial in the British Isles where the accident occurred." J. A. A78. Furthermore, the court considered that the facts that "the witnesses and other evidentiary materials that are located in Scotland are beyond the reach of compulsory process of this court," J. A. A77, and that the defendants would not be able to implead potential Scottish third-party defendants, rendered it "unfair to make Piper and Hartzell proceed to trial in this forum." *Id.* In this connection, the court deemed it relevant that representatives of the five decedents represented here by respondent had brought suit against the pilot's estate, McDonald Aviation (the operating company), and Air Navigation and Trading (the owner of the aircraft) in Scotland. *See* J. A. A70. The court reasoned that "it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses." J. A. A78.

The district court determined that the factors relating to public interests also "strongly point to dismissal." J. A. A78. First, the court observed that "a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties," J. A. A78-A79, because "Pennsylvania law would apply to Defendant Piper and . . . Scottish law would apply to Defendant Hartzell." J. A. A79. Second, the court pointed out that it was "not familiar with the law of Scotland and would have to rely upon experts from that country." J. A. A85. Third, the Court was persuaded of "the unfairness of burdening citizens in this forum with jury duty when this forum has little connection with the controversy." J. A. A86. Fourth, the court was concerned that trial of the case, which "would take weeks," *id.*, would impose "a huge burden on this court in terms of both time and the costs involved." *Id.*

The court further reasoned that "Scotland has a large interest in the outcome of the litigation as [the accident] occurred in its airspace." J. A. A86-A87.

After reviewing the factors identified by this Court in *Gilbert*, the district court considered and rejected respondent's additional argument that dismissal would be unfair because the Scottish law relating to capacity to sue, liability, and damages would be less favorable to recovery:

> That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum.

J. A. A87.

4. The court of appeals reversed and remanded the case for trial. The court began with the premise that, contrary to the view of the district court, respondent was entitled to a strong presumption in favor of her choice of an American forum, notwithstanding that all real plaintiff parties in interest are foreign. J. A. A128-A130. The court acknowledged that "[t]he standard of review is one of abuse of discretion," J. A. A131, but stated that "if the trial court has not held the defendants to their proper burden . . . the equivalent of an abuse of discretion has been demonstrated." *Id.* The court did

not further consider whether the district court had abused its discretion. Instead, the court proceeded to analyze the question of *forum non conveniens* as if the motions for dismissal were before it for *de novo* consideration.

Although the court of appeals recognized that the factors relevant to *forum non conveniens* are those spelled out in *Gilbert*, J. A. A131-A132, it largely dismissed the factors relating to private interests. The court disregarded all considerations relating to securing the attendance of witnesses, purportedly because of the absence of any supporting affidavit, J. A. A132-A134, even though Piper in fact had filed such an affidavit in the district court. *See* Pet. App. F, pp. 1f-3f. The court regarded the problems arising from the absence of compulsory process and the inability to implead potential Scottish third-party defendants as "burdensome" but not "unfair." J. A. A135-A137. And the court apparently believed that inspection of the wreckage would be irrelevant to the litigation. J A. A137.

In the view of the court of appeals, one consideration was decisive: the fact that remitting the real plaintiff parties in interest to their Scottish remedies "would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case." J. A. A139. The court refused to countenance any dismissal that would subject the real plaintiff parties in interest to the disadvantages of the substantive law of their home forum:

> . . . a dismissal for forum non conveniens. . . "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

J. A. A139-A140 (footnote omitted), *quoting DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

With regard to the factors relating to public interests identified by this Court in *Gilbert*, the court of appeals first held that the necessity of applying foreign law was not even a permissible consideration. J. A. A138-A139. The court then concluded that, in any event, Pennsylvania law would govern the action against Piper, J. A. A144-A151, and "American standards of liability," J. A. A155, would govern the action against Hartzell, J. A. A152-A156. The court brushed aside all other public interest factors with the unelaborated assertion that "Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute." J. A. A156.

INTRODUCTION AND SUMMARY

"The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507 (1947). As Alexander Bickel acutely observed in an early article,

> The problem of *forum non conveniens* is really an obvious one. It is this: How much freedom is a plaintiff to have in choosing the place where he wishes to bring suit. He once had next to none. In modern times he has been largely freed of rigid venue restrictions, and been given an area of discretion so wide that, in the judgment of many commentators, he is able to abuse it.

Bickel, *The Doctrine of Forum Non Conveniens as Applied In the Federal Courts in Matters of Admiralty*, 35 Cornell L. Q. 12, 14 (1949). The doctrine of *forum non*

conveniens permits a court to protect against such abuse, and to provide for a fairer and more rational allocation of judicial and private resources, by resisting imposition upon its jurisdiction when a careful balancing of factors indicates that "the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. 413, 423 (1932).

As early as 1941, Justice Frankfurter was able to refer to "the familiar doctrine of *forum non conveniens*" as among the "manifestations of a civilized judicial system [that] are firmly imbedded in our law." *Baltimore & Ohio Railroad Co.* v. *Kepner*, 314 U.S. 44, 55-56 (1941) (dissenting opinion). At that time, the doctrine already had an ancient lineage in the state courts, *see* Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 915-16 (1947), and in admiralty cases in federal courts, *see generally* Bickel, *supra*, 35 Cornell L. Q. at 19-41. But it was not until 1947 that this Court, in *Gulf Oil Corp* v. *Gilbert*, *supra*, established comprehensive guidelines for the application of the doctrine.

In *Gilbert*, the Court emphasized that "[t]he doctrine leaves much to discretion of the court to which plaintiff resorts . . ." 330 U.S. at 508. In exercising that discretion, however, a court is to weigh specific factors relating to private and public interests:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . .

> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09.

Shortly after this Court decided *Gilbert* and its companion case, *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518 (1947), Congress enacted 28 U.S.C. §1404(a), 62 Stat. 937 (1948), providing that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." This statute, which "permit[s] courts to grant transfers upon a lesser showing of inconvenience," *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955), has displaced the doctrine of *forum non conveniens* when the choice is between two federal courts. *See, e.g., Levin* v. *Mississippi River Corp.*, 289 F. Supp. 353, 362-63 (S.D.N.Y. 1968). "The enactment of §1404(a) has not, however, terminated the federal court's power to dismiss a case on forum non conveniens grounds, especially where no alternative federal forum is available and the more convenient forum is located in a foreign country." Note,

The Convenient Forum Abroad, 20 Stan. L. Rev. 57, n.2 (1967). In such cases, which typically arise out of accidents occurring abroad, the lower federal courts continue to be guided by the standards set forth in *Gilbert. See, e.g., Pain* v. *United Technologies Corp.,* 637 F.2d 775 (D.C. Cir. 1980); *Codex Corp.* v. *Milgo Electronic Corp.,* 553 F.2d 735 (1st Cir.), *cert. denied,* 434 U.S. 860 (1977); *Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent,* 636 F.2d 860 (2d Cir. 1980); *J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Ltd.,* 462 F.2d 998 (8th Cir. 1972); *Paper Operations Consultants Int'l, Ltd.* v. *S.S. Hong Kong Amber,* 513 F.2d 667 (9th Cir. 1975).

The controlling force of *Gilbert* has been recognized in these various cases, and by the courts below, *see* J. A. A70-A71, A131-A132, notwithstanding that this Court has never expressly determined whether, in diversity cases such as this, application of the doctrine of *forum non conveniens* is a matter of federal or local law. The Court avoided deciding this issue in both *Gilbert* and *Koster. See* 330 U.S. at 509; 330 U.S. at 529. *See also Williams* v. *Green Bay & W. R. Co.,* 326 U.S. 549, 558-59 (1946). Lower federal courts frequently deal with this problem, as did the court of appeals below, *see* J. A A128 n.20, by observing that state law does not differ from federal law. In view of the commanding position that *Gilbert* occupies in this area of the law, such observations may well be correct as a general matter. In fact, however, the federal courts rarely purport to engage in full-blown analysis and application of the local law of *forum non conveniens.* Instead, they proceed for all intents and purposes to formulate and apply federal law.

Certainly this is what the court of appeals below was doing when it held that a dismissal for *forum non conveniens* will not be granted when to do so would result in a change in the applicable law. *See* J. A.

A139-A140. We have found no support for that proposition in either Pennsylvania or California law, and the court of appeals did not even attempt to adduce such support. If local law, rather than federal law, is controlling in these cases, the court of appeals simply violated *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), by making up its own rules instead of conscientiously applying state law.

The parties in this litigation all agree, however, that the doctrine of *forum non conveniens*, which is a procedural matter relating to the discretionary exercise of jurisdiction, plainly calls for the application of federal rather than local law in diversity cases. *See* J. A. A127. *See generally* 1A (Pt. 2) *Moore's Federal Practice* ¶ 0.317 [2] at 3232-33 (1981). As this Court noted in *Koster*, "[w]e are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties . . . ." 330 U.S. at 520 n.l. It would be anomalous indeed if the "autonomous administration of the federal courts" were to be controlled by state law. By the same token, a state's rules of *forum non conveniens* relate to the administration of the state's courts. Such rules are not "bound up with [state-created] rights and obligations in such a way that [their] application in the federal courts is required." *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 535 (1958).

Moreover, although in *Gilbert* and *Koster* this Court formally left open the question whether the applicable doctrine of *forum non conveniens* in diversity cases is federal or local, the Court's opinions make it apparent that the Court was applying federal law. "[I]f the Court had felt compelled to follow state law, the proper procedure would have been to discuss state law first and apply it rather than to discuss the general principle first

and then note parenthetically that state law would lead to the same result." *Lapides* v. *Doner,* 248 F. Supp. 883, 891 (E.D. Mich. 1965). *Cf. Parsons* v. *Chesapeake & Ohio Ry. Co.,* 375 U.S. 71, 73-74 (1963) ("a prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power . . . to rule upon a motion to transfer under §1404(a)"). Consequently, "[v]irtually all the district courts and commentators that have squarely faced the issue have decided to apply federal law." J. A. A127 n.19. *See also, e.g., Founding Church of Scientology* v. *Verlag,* 536 F.2d 429, 434 n.13 (D.C. Cir. 1976); *Szantay* v. *Beech Aircraft Corp.,* 349 F.2d 60, 66 (4th Cir. 1965); *Willis* v. *Weil Pump Co.,* 222 F.2d 261 (2d Cir. 1955).

A

In considering the factors that bear upon application of the doctrine of *forum non conveniens,* little weight need be given to a nonresident alien's choice of an American forum. To be sure, this Court has indicated, in cases involving American plaintiffs, that a plaintiff's "choice of forum should rarely be disturbed," *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. at 508, at least where he "has sued in his home forum," *Koster* v. *Lumbermens Mutual Casualty Co.,* 330 U.S. at 524. But the Court also has taken care to emphasize that "[a]pplication of *forum non conveniens* principles to a suit by a United states citizen . . . brings into force considerations very different from those in suits between foreigners." *Swift & Co.* v. *Compania Caribe,* 339 U.S. 684, 697 (1950). And by definition, a nonresident alien is not suing in his home forum when he brings an action here.

Nonresident aliens neither support the government as taxpayers nor bear the responsibilities of citizenship. Whereas the United States may be considered to have a special obligation to its own citizens and residents, no similar special duty of care is owed to nonresident aliens. The practical and jurisprudential considerations that traditionally have led courts not to remit American plaintiffs to their remedies abroad are largely inapplicable to cases involving foreign plaintiffs. This is especially true where, as here, the foreign plaintiffs can recommence their action in their home forum. There is little need to be concerned that a foreign plaintiff will be treated unfairly or unjustly by the courts of his own home jurisdiction.

All things considered, there appears to be no substantial reason, beyond the need to fix the burden of persuasion, for paying any deference to a nonresident alien's wish to maintain litigation here rather than in his home forum. Once the defendant has shown that the foreign plaintiff's choice of forum will entail real inconvenience and will impose an undue or unnecessary burden on the court, the foreign plaintiff bears the responsibility for establishing that such inconvenience and burden are at least equally counterbalanced by specific reasons of convenience to himself.

B.

In *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. at 419-20, this Court held that differences between the applicable substantive law of the alternative forums are irrelevant to the application of the doctrine of *forum non conveniens*. The principle thus laid down in *Canada Malting* has been uniformly followed by the lower federal courts until this case. In holding that differences

in substantive law bar dismissal for *forum non conveniens*, the court of appeals below not only ignored *Canada Malting* but also improperly displaced the balancing test of *Gilbert* and eliminated the trial court's discretion in applying that test.

The approach taken by the court below would sound the death knell of the doctrine of *forum non conveniens*. If that doctrine were to be transformed into a single-minded patron of the plaintiff's chances for maximum recovery, a foreign plaintiff, in an action such as this arising out of events or transactions abroad, could insulate himself from dismissal merely by bringing suit in a state whose choice-of-law rules called for the application of American rather than foreign law.

The approach taken by the court of appeals just makes no sense, especially where, as here, the real plaintiff parties in interest are nonresident aliens who retain the right and the ability to proceed in and invoke the protection of their home forum. There is nothing unfair about remitting foreign plaintiffs to the remedies afforded by their own legal system. But it is unfair to subject American defendants, as the court of appeals would do, to the double burden not only of an inconvenient forum but also of harsher rules of liability than would apply in the foreign plaintiffs' own home forum where the accident occurred.

The rule articulated by the court of appeals would significantly add to the burdens of the federal judiciary. The task of deciding *forum non conveniens* motions itself would be complicated by the need to "untangle problems in conflict of laws . . . ." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 509. Much more significant, however, is that the decision below amounts to an open-door policy toward foreign claimants, the predictable

result of which will be to induce essentially foreign litigation to be brought here rather than abroad. The net effect of the decision below would be to encourage and facilitate the exploitation of the American legal system by nonresident aliens, to the detriment of American citizens and American courts alike.

C.

Aside from the weight to be given to a foreign plaintiff's choice of an American forum, and the significance to be attributed to differences in substantive law, the only legal issue upon which the courts below significantly disagreed was whether American or Scottish law would apply to Hartzell if the case were tried here. Even if the court of appeals were correct that American law would apply, however, that would not justify reversal of the district court's discretionary determination to dismiss for *forum non conveniens.* Indeed, to treat the applicability of American law not as a neutral factor but as a factor virtually barring dismissal, as the court of appeals did, would be to allow consideration of the differences in the substantive law of the alternative forums to come in through the back door. The effect of such treatment would be to favor the non-resident alien who seeks to exploit liberal rules of recovery and avoid the more restrictive rules of his home jurisdiction. It would also be to allow local choice-of-law rules to affect to a substantial degree, if not determine, the outcome of a *forum non conveniens* motion. Thus all the reasons that bar consideration of differences in substantive law also require treatment of the applicability of American law under local choice-of-law rules as a merely neutral factor in evaluating a motion to dismiss for *forum non conveniens.*

In view of the otherwise lopsided balance of considerations in favor of dismissal for *forum non conveniens*, and the plaintiff's failure to make any showing of counter-balancing reasons of convenience, the district court's exercise of discretion should have been sustained. The plaintiff was not entitled to reversal merely because she prefers the American substantive law that would be applied if the case were tried here.

ARGUMENT

In An Action In Federal District Court Brought By Foreign Plaintiffs Against American Defendants, The Plaintiffs May Not Defeat A Motion To Dismiss On The Ground Of *Forum Non Conveniens* Merely By Showing That The Substantive Law That Would Be Applied If The Case Were Litigated In The District Court Is More Favorable To Them Than The Law That Would Be Applied By The Courts Of Their Own Nation

A. A Nonresident Alien's Choice Of An American Forum Is Entitled To Little Weight

The district court below determined that because the real plaintiff parties in interest were neither American citizens nor American residents, and the suit perforce was not brought in their home forum, their choice of an American forum was entitled to little weight:

> Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States. . . .
>
> Also, the plaintiff's choice of forum is generally given less weight when the forum selected is not the plaintiff's home jurisdiction. . . . Since the real parties in interest are not American citizens, and the forum of either California or the Middle District [of

> Pennsylvania] are not in any way their "home" forum, this factor of plaintiff's choice of forum is entitled to little weight.

J. A. A73-A74. The court of appeals not only rejected this conclusion of the district court, J. A. A129-130, but even treated it as "equivalent of an abuse of discretion . . . ." J. A. A131.

The district court was right to give little weight to the plaintiff's choice of forum in this case. The entire history of the doctrine of *forum non conveniens*, as well as the logic of this Court's decisions giving effect to that doctrine, support the common-sense approach taken by the district court.

The origin of the doctrine of *forum non conveniens*, at least in the federal courts, lies in the power of an admiralty court to decline to exercise its jurisdiction over suits brought by aliens. *See* Braucher, *supra*, 60 Harv. L. Rev. at 920. Throughout much of the long history of its evolution, the doctrine applied solely to such suits. Thus, in reviewing the application of the doctrine in admiralty cases, Professor Braucher concluded in 1947 that "no court seems to have applied the doctrine to dismiss a suit brought by an American citizen in his own right. . ." *Id.* at 921.

In *Gilbert*, this Court held that the doctrine of *forum non conveniens* could be applied to dismiss an action brought by an American citizen. And in *Koster*, dismissal was approved even though the citizen had sued in his state of residence. But in each of those cases, the alternative forum was within the United States. In cases arising out of foreign disputes or transactions, the courts remained reluctant to dismiss an action brought by an

American citizen. As late as 1967, it could still be said that in "no case. . . [has] a bona fide American plaintiff . . . been sent abroad solely on forum non conveniens grounds." Note, *supra*, 20 Stan. L. Rev. at 74.

The historic deference accorded to an American plaintiff's choice of an American forum may now be on the wane. *See Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent,* 636 F.2d at 867-71. But even today there are few instances in which an American Plaintiff's suit against a foreign defendant has been dismissed for *forum non conveniens.* In contrast, the cases are legion in which the suits of nonresident aliens, including suits, such as this, brought be merely nominal American plaintiffs, have been dismissed. *See id.* at 59-67, 68-71.

Citizenship, or at least residence, is likely to bear significantly on the balance of private interests and convenience; it normally is easier for a plaintiff to proceed in his home forum. Citizenship or residence also is relevant to the public interests identified in *Gilbert.* "[A]n American [plaintiff] after all pays taxes toward the support of the Federal courts and is therefore somewhat entitled, where a foreigner has no claim at all, to burden them with a not excessive measure of inconvenience." Bickel, *supra,* 35 Cornell L. Q. at 44-45. In addition, a government may have a special duty to its citizens and residents that transcends mere pocketbook considerations. This Court suggested as much when it held, in *Swift & Co.* v. *Compania Caribe,* 339 U.S. at 697-98 (emphasis added), that "it was improper under the circumstances here shown to remit a *United States citizen* to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given equal to what had been obtained by attachment in the District Court."

The courts of this country owe no similar special duty of care to noresident aliens. This Court has treated decisions applying the doctrine of *forum non conveniens* to actions brought by American citizens as largely "inapposite" to cases involving "alien or non-resident parties." *Canada Malting Co.* v. *Paterson Co.*, 285 U.S. at 423. The considerations that traditionally have led courts not to remit American plaintiffs to their remedies abroad do not apply with the same force, if indeed they apply at all, to cases involving foreign plaintiffs. This is especially true where, as here, the foreign plaintiffs retain the right and ability to proceed in their home forum. Concern that the "procedures of the foreign system may not comport with American concepts of procedural or substantive fairness [or that] . . . the foreign legal system may be . . . bias[ed] against foreigners in general, or against Americans in particular," Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. Chi. L. Rev. 373, 384 (1980), is simply out of place when the "foreign system" in question is the plaintiff's own home forum. Whatever may now be considered the appropriate rule with regard to actions brought by American plaintiffs, the virtually unanimous view in the lower federal courts is that a nonresident alien's choice of an American forum is entitled to little weight. *See Pain* v. *United Technologies Corp.*, 637 F.2d at 795-96. *See also* Note, *supra*, 47 U. Chi. L. Rev. at 379.

To be sure, this Court in *Gilbert*, in the context of a suit brought by an American citizen, observed that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. at 508. But "[a]pplication of *forum non conveniens* priciples to a suit by a United States citizen . . . brings into force considerations very different from

those in suits between foreigners." *Swift & Co.* v. *Compania Caribe*, 339 U.S. at 697. The Court's observation in *Gilbert* itself implies that in some circumstances the plaintiff's choice of forum may be disturbed even though the balance may not be "strongly in favor of the defendant." That may appropriately be the case with respect to actions brought by or on behalf of nonresident aliens. The Court's observation, moreover, must be read together with its more extensive discussion of the question in *Koster*. There, the Court reasoned that some weight, but only limited weight, was due the plaintiff's choice of forum, *when that forum was his home forum*:

> [The plaintiff ordinarily] should not be deprived of the presumed advantages of his home jurisdiction . . . In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.

330 U.S. at 524. Thus, even when the plaintiff proceeds in his home forum, he must make "a real showing of convenience" in order to justify the choice of a forum that is inconvenient to the defendant or burdensome to the court. It follows that a plaintiff who has brought suit elsewhere must make a more compelling justification of his choice of an inconvenient forum. Moreover, since by definition an action brought in an American court by a nonresident alien is never brought in the plaintiff's home forum, dismissal of such an action never deprives the plaintiff "of the presumed advantages of his home jurisdiction." A nonresident alien's choice of an American forum therefore is never entitled to the weight accorded by *Koster* to a citizen's decision to bring suit in his home state.

All things considered, there appears to be no substantial reason, beyond the need to fix the burden of persuasion, for paying any deference to a nonresident alien's wish to maintain litigation here rather than in his home forum. A nonresident alien can fairly be presumed to be at least as familiar with the legal system of his home jurisdiction as with American law. Trial in this country normally will not be more convenient for a foreign plaintiff; and in those rare cases in which it is, that fact can be considered in the balance of private interests. Finally, there is little practical basis or jurisprudential justification for being concerned over the ability or willingness of the foreign plaintiff's home jurisdiction to do justice to his claims.

A nonresident alien's choice of an American forum therefore should be given no independent significance, except insofar as that choice serves to place the burden of persuasion upon the defendant who moves to dismiss. Beyond that, the foreign plaintiff's choice of forum should have no force. Once the defendant has shown that the foreign plaintiff's choice of forum will entail real inconvenience and will impose an undue or unnecessary burden on the court, the foreign plaintiff should bear the responsibility for establishing that such inconvenience and burden are at least equally counterbalanced by specific reasons of convenience to himself.

B. Dismissal Of A Nonresident Alien's Action From An Inconvenient American Forum Is Not Improper Merely Because It May Subject Him To The Less Advantageous Substantive Law Of His Home Forum

"A dismissal on forum non conveniens grounds almost invariably involves a change in the law applicable to the plaintiff's case, although the choice-of-law rules of the second forum may result in the application of the

same substantive law." Note, *Erie, Forum Non Conveniens and Choice of Law in Diversity Cases*, 53 Va. L. Rev. 380, 385 (1967) (footnotes omitted). Thus the law of Scotland, including its choice-of-law rules, would control if this action were recommenced there. The courts below both recognized this fact, but they disagreed as to its relevance.

The district court held that the prospect of a possible change in the applicable substantive law "is not a weighty consideration," J. A. A87:

> We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. *If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum.*

Id. (emphasis added). In contrast, the court of appeals, which assumed, without analyzing Scotland's choice-of-law rules, that "dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case," J. A. A139, held that dismissal for *forum non conveniens* was precluded as a matter of law:

> . . . a dismissal for forum non conveniens . . ."should not, despite its convenience, result in a change in the applicable law." *Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.*

J. A. A139-A140 (emphasis added), *quoting DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 436 U.S. 904 (1978).

The decision of the court of appeals marks a startling departure from the law of *forum non conveniens* established and applied by this Court and the other lower federal courts. In *Canada Malting Co.* v. *Paterson Co., supra*, this Court considered and explicitly rejected the very rule adopted by the court of appeals below. In *Canada Malting*, which arose in admiralty, the libellant, a Canadian corporation, had brought suit here because it preferred American law to that of Canada. 285 U.S. at 418. The district court dismissed for *forum non conveniens*, and the court of appeals affirmed. *Id.* at 417. This Court also affirmed. The Court held that the difference in applicable substantive law, and indeed the entire question of which substantive law would apply, was irrelevant to the doctrine of *forum non conveniens:* "[w]e have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy." *Id.* at 419-20. *See also* Bickel, *supra*, 35 Cornell L. Q. at 37.

The principle laid down in *Canada Malting* was given effect in *Gilbert*. In that case, it was apparent that dismissal for *forum non conveniens* could result in the application of different substantive law by the alternative forum (the plaintiff's home forum). *See* 330 U.S. at 511-12. Yet, in comprehensively discussing the factors to be weighed, and in upholding dismissal, the Court pointedly ignored any possible differences in substantive law. Thus, *Gilbert* confirms that it simply is not pertinent to *forum non conveniens* that the plaintiff's home

forum may apply substantive rules different from those that would govern in the inconvenient forum in which the plaintiff initially chose to bring suit.

Except for the court of appeals below, the lower federal courts have uniformly followed the guidance provided by *Canada Malting* and *Gilbert*. The District of Columbia Circuit has approvingly summarized the case law:

> . . . the comparative amount of recovery obtainable in the two alternative forums has never been considered a factor relevant to the *forum non conveniens* inquiry. In almost every *forum non conveniens* decision the substantive law of one forum potentially favors one litigant over the other. Choice of the applicable substantive law will almost inevitably affect the amount of recovery; thus, an entire body of conflicts-of-law principles has evolved to aid courts making such choices. When a court engages in a *forum non conveniens* analysis, however, its central concern is furthering the just, speedy and inexpensive determination of the action. The *Gilbert* factors are intended to reflect those "*practical* problems that make trial of a case easy, expeditious and inexpensive," not the factors such as choice of governing law which affect the substantive disposition of the case.

Pain v. *United Technologies Corp.*, 637 F.2d at 794-95 (footnotes omitted) (emphasis in original). *See also, e.g., Alcoa Steamship Co.* v. *M/V Nordic Regent*, 636 F.2d at 871-72; *Anastasiadis* v. *S.S. Little John*, 346 F.2d 281, 283 (5th Cir. 1965), *cert. denied*, 384 U.S. 920 (1966). This unanimity of decision has led the commentators, quite rightly, to treat the matter as settled:

> . . . differences in applicable law will not be considered in a decision on a forum non conveniens motion. Thus the usual forum non conveniens

> criteria — such as presence of witnesses, location of documents, and availability of expert witnesses — must be considered by the district court without a weighing of the substantive legal effects that the jurisdictional decision may have on the ultimate recovery . . . [I]f the court does find that a more convenient forum exists abroad, it will not choose to retain the action simply because a foreign court would award smaller damages to the libelant.

Note, *supra*, 20 Stan. L. Rev. at 64-65. *See also* Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 Va. J. Int'l L. 755, 773 (1977).

In nevertheless holding that differences in applicable law not only will be considered but actually will be allowed to control the outcome of a motion to dismiss for *forum non conveniens*, the court of appeals below completely ignored this long and consistent line of contrary authority. In addition, by establishing a rigid rule for disposing of *forum non conveniens* motions, the court below both displaced the balancing test of *Gilbert* and essentially eliminated the trial court's discretion in applying that test. In the view of the court of appeals, the plaintiff's choice of a forum with more favorable substantive law requires that trial be held in that forum, no matter how inconvenient that choice may be to the defendant or how burdensome to the court.

The court of appeals reached its novel result apparently out of a belief that it was required to do so by this Court's decision in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964). *See DeMateos* v. *Texaco, Inc.*, 562 F.2d at 899. The Third Circuit apparently is unique in giving that reading to *Barrack*. This Court in *Barrack* simply

held that, upon a statutory transfer from one federal district court to another under 28 U.S.C. §1404(a), the transferee forum "generally," 376 U.S. at 639, should apply the substantive law of the transferor forum. That decision plainly does not dictate the result reached by the court below.

This Court had noted in *Norwood* v. *Kirkpatrick*, 349 U.S. at 32, that transfers are available under 28 U.S.C. §1404(a) "'whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.'" The question thus presented in *Barrack* was whether, upon the lesser showing of convenience required by 28 U.S.C. §1404(a), "a change of venue within the federal system is to be accompanied by a change in the applicable state law." 376 U.S. at 625. The Court concluded that since the statutory transfer provision was merely "a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts," *id.* at 636, "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue," *id.* at 639. The Court recognized, however, that this result was different from that which would obtain upon dismissal for *forum non conveniens*, and for that reason the Court specifically left open the question whether the transferee federal court would be required to apply the law of the transferor forum in those cases where it could be contended that a court of the transferor state "would simply have dismissed the action on the ground of *forum non conveniens*." *Id.* at 640.

Nothing in *Barrack* indicated an intention to overrule *Canada Malting* or otherwise work any change in the law of *forum non conveniens*. To the contrary, the Court was concerned solely with the consequences of "a change of venue within the federal system," 376 U.S. at

625, and not with the different considerations that come into play when the more convenient forum is in a foreign country. The law of *forum non conveniens* was left intact.

It should be borne in mind, moreover, that in *Barrack* the Court's attention was directed chiefly to the law to be applied by the transferee forum, not to the factors to be weighed by the transferor forum. The Court's conclusion, that the transferee forum applies the substantive law of the transferor forum, is of course a possible outcome in *forum non conveniens* cases as well. For example, if this litigation were recommenced in Scotland, it would be open to a Scottish court to apply the same substantive rules that would have governed the litigation here. But that would be a matter for the courts of Scotland to decide; their concept of justice, as expressed through their choice-of-law rules, appropriately would govern.

The implication of the decision below appears to be that the choice of substantive law is a matter just too important to be be left to the Scottish courts. But nothing in this Court's decision in *Barrack* suggests that the federal courts may refuse to dismiss for *forum non conveniens* merely out of a parochial concern that the more convenient foreign forum, in implementing its own view of the interests of justice, will choose substantive rules different from those that would apply here. To the contrary, this Court has instructed that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *The Bremen* v. *Zapata Off-Shore Company*, 407 U.S. 1, 9 (1972).

Even if the dictates of authority and prior law could be put aside, there would remain abundant reasons for rejecting the approach taken by the court of appeals in this case. First and foremost, the lower court's holding, if adopted by this Court, would sound the death knell of *forum non conveniens*. The Second Circuit has trenchantly observed:

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. . . . *A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover.*

Fitzgerald v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976) (emphasis added).

A doctrine of *forum non conveniens* that operated as a single-minded patron of the plaintiff's chances for maximum recovery, and was available only when dismissal would have no effect on the applicable substantive law, would serve little purpose. Under such a doctrine, a foreign plaintiff, in an action arising out of events or transactions abroad, could insulate himself from dismissal merely by selecting a forum whose choice-of-law rules called for the application of American rather than foreign law. *Cf. Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980) (affirming dismissal for *forum non conveniens* on facts virtually identical to those here, with the difference that the domestic forum, Delaware, would have applied foreign rather than American law). If the doctrine of *forum non conveniens* is to be reduced to a mere by-product of local choice-of-law rules, it might as well be

abolished outright. It will be a rare American defendant who is subject to suit for events or transactions occurring abroad but can be found only in jurisdictions that apply the choice-of-law rule of *lex loci delicti*. *See Gutierrez* v. *Collins*, 583 S.W. 2d 312, 316 (Tex. 1979) ("more than twice as many states have abandoned *lex loci delicti* as have retained it"). And the doctrine of *forum non conveniens* could not in any event perform its important function of rationalizing the allocation of judicial and private resources if it were available only in *lex loci* jurisdictions.

Considered from almost any conceivable perspective, the approach taken by the court of appeals just makes no sense. This is especially true where, as here, the real plaintiff parties in interest are nonresident aliens who retain the right and the ability to proceed in and invoke the protection of their own home forum. We can begin by looking at the matter from the perspective of the private parties. Of course, it goes without saying that the defendants see no reason whatsoever why they should be subjected to the double burden not only of an inconvenient forum but also of harsher rules of liability than would be applicable in the foreign plaintiffs' own home forum, where the accident occurred. But surely, even from the perspective of foreign plaintiffs, there is nothing unfair about remitting them to the remedies afforded by their own legal system. After all, the doctrine of *forum non conveniens* in large part reflects recognition that there is a fitness and propriety in letting the home jurisdiction provide the law for and resolve the claims of its citizens, especially where, as here, the injury actually occurred in that jurisdiction. Moreover, in traveling or otherwise conducting transactions in their own country, the decedents, for whose deaths the plaintiffs seek recovery, presumably relied upon or assumed

the applicability of local law. Certainly they had no legitimate expectation that their affairs would be governed by American law. There is no more justification here than in *Canada Malting* for permitting the plaintiffs to subject the defendants to an inconvenient forum merely in order to take advantage of more favorable American rules of recovery. Indeed, there is even less justification than in *Canada Malting,* for in that case at least the accident had occurred within the United States. *See* 285 U.S. at 417.

The same conclusion follows when the matter is viewed from the perspective of the federal courts and the American judicial system as a whole. The rule articulated by the court of appeals, as is at least partially evident in the court's own opinion, overly complicates the task of deciding *forum non conveniens* motions by enmeshing the court and the parties in a lengthy analysis of the substantive laws and the choice-of-law rules of the competing forums. The doctrine of *forum non conveniens* will become much too unwieldy to serve its purpose of expeditious administration if it is to be encumered in every case by an excursion into the realm of comparative international law. Indeed, as this Court noted in *Gilbert,* one purpose of *forum non conveniens* is to avoid the very need to "untangle problems in conflict of laws." 330 U.S. at 509.

The rule announced by the court below, moreover, amounts to an open-door policy toward foreign claimants that is likely to result in greater burdens upon and congestion in the federal courts. This is not just a matter of requiring the federal courts to retain cases that they otherwise would have dismissed. That in itself is a problem, but it may be only the tip of the iceberg. If foreign claimants become aware that they can bring suit

here without significant risk of dismissal for *forum non conveniens*, the predictable result will be a substantial increase in the amount of litigation brought here rather than abroad. Strict rules of liability, large jury verdicts, contingent fees, and other favorable features of the American legal system would exert an almost irresistable attraction. If *forum non conveniens* were essentially inapplicable, virtually every serious injury anywhere on the globe that arises out of the use of equipment manufactured in the United States — no matter how old the equipment was, and no matter with what skill or by whom the equipment was operated and maintained — could be expected to generate litigation in this nation's courts. An historic purpose of *forum non conveniens* has been to resist such essentially foreign litigation and thereby lessen the burden on American courts that litigation of that kind would impose:

> As early as 1848 a federal court in declining to hear an admiralty suit between British subjects said: ". . . it would be lamentable if courts were compelled to defer the business of the citizens of the country to bestow their time on litigations between parties owing no allegiance to its laws, and contributing in no way to its support."

Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 404 (1947). This purpose would be almost completely frustrated by a rule that barred dismissal whenever the foreign plaintiffs can colorably allege that they have a greater prospect of recovery in American courts than in the courts of their own nation.

The rule adopted by the court below certainly makes no sense when viewed from the generalized perspective of our own national interest. At bottom, the court's decision encourages the exploitation of the American

legal system for the benefit of nonresident aliens and to the detriment of American citizens and residents. There is little enough reason why, in our choice-of-law rules, we should subject American citizens to greater duties to foreigners abroad than the foreign state itself imposes. But there is even less reason for further subjecting American citizens to the burden of defending themselves in demonstrably inconvenient forums merely in order to facilitate the foreign claimants' ability to exploit those choice-of-law rules and other advantages they may derive from proceeding in our courts rather than in their home forum. As Justice Holmes aptly observed, "[t]he extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold." *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 479 (1912).

The historic and long-standing practice under the doctrine of *forum non conveniens*, endorsed by this Court in *Canada Malting*, has been to determine the more convenient forum without regard to differences in substantive law. That practice is supported by ample common sense and sound reasons of policy and should be reaffirmed.

C. Reversal Of The District Court's Order Dismissing For Forum Non Conveniens Was Not Warranted By The Mere Fact That In Litigation Here The Plaintiff's Claims Would Be Governed By American Rather Than Scottish Law

"Unlike issues of jurisdiction, determinations of *forum non conveniens* are not pure questions of law; rather they represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another."

Pain v. *United Technologies Corp.*, 637 F.2d at 781. Appellate review, therefore, is solely to determine whether there has been an abuse of discretion:

> . . . a federal district court has the inherent power to dismiss an action which it deems an imposition upon its jurisdiction so long as an adequate alternative forum is available and so long as the trial judge has carefully "weigh[ed the] relative advantages and obstacles to fair trial" and, taking into consideration the plaintiff's original choice of forum, found the balance of public and private interests to favor dismissal. When appraising a lower court's *forum non conveniens* determination, an appellate court may not substitute its judgment for that of the district court in the absence of a clear abuse of discretion.

Id. at 779 (footnotes omitted). *See also, e.g., Gulf Oil Corp.* v. *Gilbert,* 330 U.S. at 508; *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. at 531; *Alcoa Steamship Co.* v. *M/V Nordic Regent,* 636 F.2d at 871; *Paper Operations Consultants Int'l, Ltd.* v. *S.S. Hong Kong Amber,* 513 F.2d at 670; *Marbury-Pattillo Construction Co.* v. *Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974).

In this case, it is undisputed that an adequate alternative forum is available in Scotland. It also is clear that the district court carefully weighed the relative advantages and obstacles to fair trial. *See* pp. 4-7, *supra.* The district court's order, therefore, should have been routinely affirmed. The court of appeals nevertheless substituted its own judgment for that of the district court and reversed.

The court of appeals paid lip service to the proper standard of appellate review, but it concluded that the district court, by giving a nonresident alien's choice of

forum little weight, had committed "the equivalent of an abuse of discretion . . . ." J. A. A131. The court then reversed, holding that dismissal for *forum non conveniens* is improper where it would subject nonresident aliens to the less advantageous substantive law of their home forum. As we have seen, the court of appeals was wrong on both counts.

What we are left with, therefore, is the balance of factors already weighed by the district court. And that balance tilts heavily toward dismissal for *forum non conveniens*. The trial judge did not abuse his discretion.

The balance of private interests points overwhelmingly to dismissal. The first of these interests is "the relative ease of access to sources of proof . . . ." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 508. The defendants will assert that the cause of the Scottish air crash that gave rise to this litigation was either improper maintenance or improper operation of the aircraft. These defenses depend upon demonstrative, documentary, and testimonial evidence that is available only in Great Britain. All maintenance, flight, and operational records are there, as are the records pertaining to the pilot's training. That is where the employees of the owner and the operator of the aircraft can be found. That is where the government officials reside who investigated the crash, and where the records and reports pertaining to that investigation are located. And because the decedents were all Scottish citizens and residents, and their heirs are too, all evidence relevant to damages, as, for example, the financial loss suffered as a result of the allegedly wrongful deaths, also is in Scotland. All of "these witnesses are critical to this case and since they are located in Scotland, it would be more convenient for the witnesses and less costly for the litigants to litigate

this matter in Scotland." J. A. A75. None of this evidence, moreover, would be available to the defendants through compulsory process in litigation here.

"The inability to implead other parties directly involved in the controversy is a factor which weighs against the retention of jurisdiction . . . ." *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d at 453. Joinder of the owner of the aircraft and its operator, as well as the pilot's estate, is crucial to the presentation of the defense in this case. Yet the defendants cannot, in an American forum, implead these potential Scottish third-party defendants. Especially since those Scottish parties already are involved in litigation in Scotland arising out of the same crash, the district court quite reasonably concluded that "it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses." J. A. A78. Even the court of appeals acknowledged that "the defendants' inability to implead other potentially liable parties would indeed make litigation here more burdensome . . . ." J. A. A137. The court questioned, however, whether it would make litigation here "unfair." *Id.* This question was thoroughly considered and correctly answered in *Pain* v. *United Technologies Corp.*, 637 F.2d at 790-91 (emphasis in original):

> We acknowledge that UTC, if found liable in a United States court, would still be able to press a right of indemnification against Helikopter in the courts of Norway. Three considerations convince us that UTC would nevertheless remain prejudiced by suit here. First, UTC would still be severely hampered in the presentation of its defense in *this* case by the inability to join Helikopter as a party. Second, judicial resources would be conserved if all liability were affixed in one suit, and total relief

> granted in one action. . . . Third, foreign courts might place a limit on the amount that UTC could recover against Helikopter in a separate proceeding brought abroad, thus preventing UTC from obtaining full recovery-back of any amount awarded against it in litigation in this country. This consequence would place UTC at a significant disadvantage if the litigation were to be conducted here. Clearly, the inability of the district court to accord full relief suggests that it is inferior to a forum which might possess jurisdiction over *all* significant parties to the dispute.

It is also pertinent to the actual trial of the case that the crash occurred in Scotland:

> It is routine procedure for the judge and jury to view the scene of the accident, often more than once. Jurors drawn from the venue of the accident may be better able to understand testimony pertaining to local conditions and geography.

Lee-Hy Dairy Corp. v. *O'Connor*, 439 U.S. 1034, 1037 (1978) (*denying cert.*, Powell, J., dissenting). The district court quite properly considered these factors and concluded that "[f]amiliarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles where the accident occurred." J. A. A78.

These considerations, taken together, militate so strongly in favor of trial in Scotland that dismissal for *forum non conveniens* should be sustained in the absence of a compelling showing that the public interests identified in *Gilbert* require the litigation to go forward here. In this case, no such compelling showing can be made, for those public interests in fact also point toward trial

in Scotland. The factors listed in *Gilbert* themselves make this clear:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

330 U.S. at 508-09. This case originated in the crash in Scotland of an aircraft owned by one Scottish concern, operated by another, and flown by a Scottish pilot; all decedents were Scottish citizens and residents; all real plaintiff parties in interest are Scottish citizens and residents. This localized controversy cries out for a Scottish forum. *See* J. A. A86-A87.

The court of appeals, in its preoccupation with the question of choice of law, apparently lost sight of all these larger considerations. The district court had determined that, in litigation here, the issue of Piper's liability would be determined under Pennsylvania law whereas that of Hartzell's would be governed by Scottish law. *See* J. A. A79. The district court had viewed this as an additional factor favoring dismissal, both because different rules would apply to the two defendants and because the court was unfamiliar with Scottish law. *See* J. A. A79, A85. The court of appeals agreed that Pennsylvania law would apply to Piper but held that Ohio rather than Scottish law would apply to Hartzell. *See* J. A. A155 and n.95. Even if the court of appeals were correct in its choice-of-law analysis, however, reversal of the district court's order was not warranted.

Whether Hartzell would be governed by Ohio or Scottish law, the fact would remain that each defendant would be subject to different standards of liability. As the court of appeals itself noted, "[t]here is some difference between . . . Pennsylvania, on the one hand, and Ohio on the other as to the standard of proof in strict liability." J. A. A155 n.95. Thus some basis remains for the district court's concern that trial would be "complex and confusing for a jury as different laws will apply to different parties." J. A. A79. This, however, is only a minor consideration. The point of major importance is that, whereas the neccessity of applying foreign law affirmatively supports dismissal, the applicability of American law under local choice-of-law rules does not affirmatively support retention of jurisdiction.

To treat the applicability of American rather than foreign law not as a neutral factor but as a factor virtually barring dismissal, as the court of appeals did, is to allow consideration of differences in substantive law to come in through the back door. Once again, a foreign plaintiff who picked an American forum whose choice-of-law rules called for the application of favorable American rules of recovery, rather than of the law of the foreign jurisdiction where the injury occurred, would be effectively insulated from dismissal for *forum non conveniens*. The result would be to favor the nonresident alien who seeks to exploit liberal American rules of recovery and avoid the more restrictive or less generous rules of his own home jurisdiction; it would be to allow local choice-of-law rules to affect to a substantial degree, if not determine, the outcome of the *forum non conveniens* motion; it would be to attract to American courts litigation that really belongs elsewhere. In short, all the reasons that bar consideration of differences in substantive law also require treatment of the applicability of

American law under local choice-of-law rules as a merely neutral factor in evaluating a motion to dismiss for *forum non conveniens*, not as a factor supporting retention of jurisdiction.

In view of the otherwise lopsided balance of considerations in favor of dismissal for *forum non conveniens*, and the plaintiff's failure to make an adequate showing of counter-balancing reasons of convenience, the district court's exercise of discretion should have been sustained. The fact that Ohio rather than Scottish law would apply to Hartzell, if trial were to be held here, did not justify the court of appeals' reversal of the district court's exercise of discretion in dismissing even as to Hartzell. *A fortiori*, it did not warrant reversal of the order dismissing as to Piper. With respect to Piper, the court of appeals left the question of choice of law largely as the district court had found it, with Piper's liability governed by Pennsylvania law. Since Piper made a sufficient showing under the *Gilbert* test to warrant dismissal for *forum non conveniens*, and since the district court made no significant error of law in applying that test to Piper, that court properly exercised its discretion in granting Piper's motion to dismiss.

CONCLUSION

The judgment of the court of appeals should be reversed.

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May 1981.

Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-883, 80-848

IN THE

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October Term, 1980.

PIPER AIRCRAFT COMPANY,

Petitioner,

vs.

GAYNELL REYNO,

Respondent.

HARTZELL PROPELLER, INC.,

Petitioner,

vs.

GAYNELL REYNO,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT GAYNELL REYNO.

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Questions Presented.

Whether, in an action in Federal District Court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied if the case were litigated in the District Court is more favorable to them than the law that would be applied by the courts of their own nation. [No. 80-848 (Piper)].

Whether a motion to dismiss on the ground of forum non conveniens should be denied because the law of the alternative forum is expected to be less favorable to the foreign plaintiff than the law that would be applied by the court deciding the motion. [No. 80-883 (Hartzell)].

Parties Below.

Respondent Gaynell Reyno, appellant in the Third Circuit Court of Appeals, brought suit as personal representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran and Peter Cunningham Scott. The petitioners were the defendants and appellees below. The petitioner Hartzell Propeller, Inc., an Ohio corporation, is affiliated only with its subsidiary Piqua Aircraft Company; Petitioner Piper Aircraft Company, a Pennsylvania corporation, is a subsidiary of Bangor Punta Corporation. Although petitions for certiorari were filed separately by each Petitioner, the cases have been consolidated for purposes of argument before this Court.

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BRIEF FOR RESPONDENT GAYNELL REYNO.

Statement of the Case.

On July 27, 1976, a small, commercial chartered aircraft went down in the Scottish highlands near Moffat, on a flight from Blackpool to Perth. (JA 18, 66, 95-96).[1] All six persons aboard the aircraft were killed. (JA 66).

The plane, a Piper Aztec, was owned by a Scottish air taxi service, and the five passengers and single pilot were Scottish. (JA 118). There were no witnesses to the crash,

[1]Citations denoted by JA are to the Consolidated Joint Appendix.

but there were indications that the left engine malfunctioned (JA 25; JA 118), although the case has not proceeded far enough on a factual basis to determine the exact nature of the cause of the crash. (JA 48).

Respondent Gaynell Reyno, acting as personal representative of the estates of the five passenger decedents, first instituted this action in the Superior Court of the State of California for the County of Los Angeles in July, 1977. (JA 68; JA 118-119). The bases for respondent's complaint for wrongful death were strict liability and negligence. (JA 119). Plaintiff contended that the malfunction of the left engine was the result of a design or manufacturing defect, and that there were several dangerous and defective conditions in the aircraft itself, including inadequacies associated with the left propeller mechanism and with the instrumentation. (JA 119).

On motion by Piper and another defendant, (Avco), later dismissed from the case by stipulation, the matter was removed from the California state court to the Federal District Court in California. Subsequently, Hartzell moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Middle District of Pennsylvania, pursuant to 28 U.S.C. §1404(a). Piper then joined in this motion and moved to dismiss, alternatively, for failure to state a cause of action, and to strike the claim for punitive damages. (JA 119). In the course of these motions, both defendants strenuously, ardently and successfully argued that the traditional determinative factors embodied in the statute and in case law mandated that the action be transferred to the District Court in Pennsylvania. (JA 44-47). The District Court agreed that it did not have personal jurisdiction over Hartzell, granted the motion to quash service of process, and transferred the entire matter to the Middle

District of Pennsylvania under 28 U.S.C. §1404(a). (JA 119-120).

Soon after the transfer, both defendants brought motions to dismiss the case on the ground of forum non conveniens, contending that the matter should be heard in Scotland. (JA67). Again, the defendants offered strenuous argument in favor of another forum, this time Scotland rather than Pennsylvania. (JA 29-42).

On October 19, 1979, the District Court, R. Dixon Herman, United States District Judge, ordered that the action "be dismissed on the conditions that Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts." (JA 88).

The Court of Appeals reversed, concluding that the defendants did not meet the burden required of them for a forum non conveniens dismissal. (JA 156). The Court's first point was that the defendants had attempted to "trifle" with the judicial process by initially arguing that Pennsylvania was the proper forum and then averring the same with respect to Scotland. In this regard, the Court relied on a decision of the Court of Appeals for the Fifth Circuit (JA 121),[2] and added that a history of a successful §1404(a) transfer prior to a forum non conveniens motion ought to add to the burden already imposed on the moving party. (JA 124).

The Court then went on to discuss comparative burdens, trial court discretion and the standard of review to which it was bound.

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[2] *Insurance Co. of North America v. Ozean/Stinnes-Linien*, 367 F.2d 224, 227 (5th Cir. 1966) (quoting *Livesay Ind. v. Livesay Window Co.*, 202 F.2d 378, 382 (5th Cir. 1953), cert. denied, 346 U.S. 855 (1953)).

Addressing first the plaintiff's choice of a forum, the Court cited the well known rule that the plaintiff's choice of a forum should rarely be disturbed, and that the nationality of the plaintiff, according to opinions of the Third Circuit and of the Supreme Court, carries little weight toward diminishing the significance of that choice (JA 129), or affecting the burden of the defendant. (JA 130). The Court also pointed out the significance in this instance of the plaintiff already having ceded the "home court advantage", stating that "[i]t would be the rare situation in which a defendant could complain of being vexed or harassed by defending a lawsuit on his home ground". (JA 130).

The Court then made clear the applicable standard of review. It stated that abuse of discretion was the sole standard, but that such an abuse of discretion was readily demonstrated if the trial court did not hold a defendant to its proper burden, or had clearly erred in weighing the factors to be considered. It held that the "district court's wide discretion may not serve the defendants as a burden-shifting device on appeal from an order in their favor." (JA 131)

The Court then went on to weigh individually the factors involved in the determination of a motion on forum non conveniens grounds.

With respect to the convenience of witnesses, the Court held that the defendants had not met with requisite specificity the requirement that they set forth the key witnesses to be called and the essence of their testimony. (JA 133). The Court then concluded that the district court was, at the very least, without sufficient information to adequately weigh this factor, and that its conclusion that this particular factor favored the defendants was without foundation. (JA 134).

With respect to the availability of compulsory process and impleader, the Court noted that defendants contended that their inability to join the Scottish parties as defendants would be unfair and unduly burdensome. However, the Court, after reasoning the question, stated that "[i]f the defendants are found liable on strict liability here but must prove negligence against the air carrier to obtain indemnity, that is not unfair, but simply the result reached under the laws of the jurisdictions in which the two companies reside". (JA 135-136). The Court then concluded that although the defendants' inability to join other potentially liable parties might make litigation in Pennsylvania more burdensome, the defendants had failed to demonstrate the inherent unfairness of such a circumstance. The Court noted that although this factor did indeed weigh in favor of the defendants, it was not greatly determinative. (JA 137).

The Court then dealt swiftly with the factor concerning viewing the premises, stating that any benefit in such a viewing was doubtful. (JA 137).

Going on to the public interest factors, the Court embarked on a lengthy and comprehensive discussion concerning choice of law. (JA 140-156). Prior to such discussion, however, the Court considered briefly whether foreign law should be applied. The Court stated that Scotland would in all probability apply its own law to all claims, rather than struggle with a mixture of American and Scottish law. (JA 139). The Court then went on to quickly reiterate the as yet unassailed holding of *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978),

that a dismissal for forum non conveniens should not result in a change in the applicable law. (JA 140).[3]

The Court's discussion with respect to choice of applicable law was thorough. However, because the issues discerned and conclusions reached are not presently before this Court, an analysis thereof need not be set forth here.

The Court then went on to instruct that the district court must proceed to determine the capacity to sue of plaintiff Reyno, allowing that an attack on her capacity at this stage of the proceedings may be too late. (JA 150-151).

Finally, the Court stated that since applicable choice of law rules lead to the recognition that Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute, other public interest factors under *Gilbert* favor trial in the United States. (JA 156).

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[3]The language in *DeMateos* in this regard is as follows: "However, in considering the propriety of a venue transfer pursuant to 28 U.S.C. §1404(a), the Court has emphasized that such a transfer should not, despite its convenience, result in a change in the applicable law. *Van Dusen v. Barrack*, 376 U.S. 612, 626-43, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). That principle is no less applicable to a dismissal on forum non conveniens grounds."

This bit of dictum in the Court of Appeals opinion in *Reyno* was seized upon by Petitioners and made the basis for their argument before this Court. Said dictum was mischaracterized by Piper as "decisive", "startling", etc. (Brief on the merits for Piper, pp. 8, 25, 27, 39), and by Hartzell as "dispositive" and "controlling". (Brief on the merits for Hartzell, pp. 4, 13, 18, 27). To accord such dispositive weight to this brief mention and affirmation of the holding in *DeMateos* is to radically misinterpret the Third Circuit's decision. That decision was based upon choice of law, and only as dictum made mention of the holding in *DeMateos*, which to date remains unchallenged. See *Melville v. American Home Assur. Co.*, 443 F.Supp. 1064, n. 51 (E.D. Pa. 1977), which held *Van Dusen* inapplicable to the situation then extant, but left untouched the principle established in *DeMateos*. The principle announced in *DeMateos* was a natural outgrowth of the holding in *Van Dusen v. Barrack, supra*, but was nonetheless set forth independently of the rule therein, which concerned interdistrict transfers pursuant to 28 U.S.C. §1404(a).

In conclusion, the Court held that defendants had not met the burden required of them for a forum non conveniens dismissal; therefore, the judgment of the district court must be reversed and the cause remanded.

The Petitions for Certiorari followed.

Summary of Argument.

I.

Certiorari in this matter was improvidently granted. Because the essence of the Court of Appeals' decision rests on choice of law principles, the question now before this Court is entirely academic. Since this Court has elected not to hear argument on the propriety of the Third Circuit's choice of law analysis, the decision of the Supreme Court should have no effect on the actual rights and liabilities of these particular parties, as determined by the Court of Appeals.

II.

The weight to be accorded the plaintiff's choice of a forum, as instructed by *Gilbert* and its progeny, is considerable. The reasons are many, but beyond all of the irrefutable and uncontradicted arguments in favor of bestowing upon the injured plaintiff the right to seek redress wherever he sees fit, there is a further, highly just and desirable benefit to be derived from according the plaintiff his choice of a forum: The defendant accused of wrongdoing will always be held to the highest available standard of accountability for his actions and resulting injuries and damages. In this way are persons and entities such as the defendant manufacturers now before this Court made aware of the extent to which they may be answerable for a panoply of wrongful acts — in this instance the dissemination of defective prod-

ucts into the worldwide mainstream of commerce and industry.

The public policy to be advanced by this vehicle is obvious. As between a jurisdiction holding manufacturers only to the standard of due care (Scotland), and a jurisdiction holding the same manufacturers to the standard of strict liability (United States), the latter can clearly be seen to better advance a policy of deterrence of wrongful conduct, while at the same time provide the injured plaintiff with the best opportunity for compensatory redress.

Thus, to look at the law of a particular forum only in terms of its "favorability" to the plaintiff is to eclipse the other, highly important half of the same concept, the ability of that forum to insure that the actions of prospective defendants are within the limits of acceptable conduct within the jurisdiction.

III.

One of the threshold instructions in *Gulf Oil Corp. v. Gilbert*,[4] acknowledged as the premier forum non conveniens decision, mandated the existence of an alternative forum before dismissal on that ground could be considered. Inherent in that mandate is the concept that plaintiff must have an adequate remedy and law available to him before another forum can be considered an acceptable alternative.

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[4]330 U.S. 501 (1947).

ARGUMENT.

I.

The Writs of Certiorari in This Matter Were Improvidently Granted.

In many cases before this Court in the past, the decision has been reached that a writ of certiorari should never have been granted, and was so done improvidently.[5]

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[5]*United States v. Rimer* (1911) 220 U.S. 547, 55 L.Ed. 578, 31 S.Ct. 596; *Furness, Withy & Co. v. Yang-Tsze Ins. Asso.* (1917) 242 U.S. 430, 61 L.Ed. 409, 37 S.Ct. 141; *Tyrrell v. District of Columbia* (1917) 243 U.S. 1, 61 L.Ed. 557, 37 S.Ct. 361; *Houston Oil Co. v. Goodrich* (1918) 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140; *Layne & Bowler Corp. v. Western Well Works, Inc.* (1923) 261 U.S. 387, 67 L.Ed. 712, 43 S.Ct. 422; *Southern Power Co. v. North Carolina Public Service Co.* (1924) 263 U.S. 508, 68 L.Ed. 413, 44 S.Ct. 164; *Keller v. Adams-Campbell Co.* (1924) 264 U.S. 314, 68 L.Ed. 705, 44 S.Ct. 356; *Davis v. Currie* (1924) 266 U.S. 182, 69 L.Ed. 234, 45 S.Ct. 88; *Missouri P. R. Co. v. Hanna* (1924) 266 U.S. 184, 69 L.Ed. 235, 45 S.Ct. 36; *Erie R. Co. v. Kirkendall* (1924) 266 U.S. 185, 69 L.Ed. 236, 45 S.Ct. 33; *Mellon v. McKinley* (1927) 275 U.S. 492, 72 L.Ed. 390, 48 S.Ct. 34; *Missouri-Kansas-Texas R. Co. v. Texas* (1927) 275 U.S. 494, 72 L.Ed. 391, 48 S.Ct. 82; *Sutter v. Midland Valley R. Co.* (1929) 280 U.S. 521, 74 L.Ed. 590, 50 S.Ct. 65; *Sanchez v. Gautiery Borras* (1931) 283 U.S. 798, 75 L.Ed. 1421, 51 S.Ct. 490; *Snowden v. Red River & B. D. G. Levee & Drainage Dist.* (1932) 284 U.S. 592, 76 L.Ed. 510, 52 S.Ct. 198; *Texas & N. O. R. Co. v. Neill* (1937) 302 U.S. 645, 82 L.Ed. 501, 58 S.Ct. 118, *reh. den.* 302 U.S. 778, 82 L.Ed. 602, 58 S.Ct. 268; *Aetna Ins. Co. v. Illinois C. R. Co.* (1937) 302 U.S. 652, 82 L.Ed. 505, 58 S.Ct. 269; *Tax Com. of Ohio v. Wilbur* (1938) 304 U.S. 544, 82 L.Ed. 1518, 58 S.Ct. 1036, *reh. den.* 305 U.S. 668, 83 L.Ed. 433, 59 S.Ct. 55; *Goins v. United States* (1939) 306 U.S. 622, 83 L.Ed. 1027, 59 S.Ct. 783; *McCullough v. Kammerer Corp.* (1945) 323 U.S. 327, 89 L.Ed. 273, 65 S.Ct. 297; *McCarthy v. Bruner* (1944) 323 U.S. 673, 89 L.Ed. 547, 65 S.Ct. 126; *Loftus v. Illinois* (1949) 337 U.S. 935, 93 L.Ed. 1741, 69 S.Ct. 1511; *Parker v. County of Los Angeles* (1949) 338 U.S. 327, 94 L.Ed. 144, 70 S.Ct. 161; *Bentsen v. Blackwell* (1954) 347 U.S. 925, 98 L.Ed. 1078, 74 S.Ct. 528; *Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500, 524, 559, 1 L.Ed.2d 493, 515, 77 S.Ct. 443, 459, 478, *reh. den.* 353 U.S. 943, 1 L.Ed.2d 764, 77 S.Ct. 808; *The Monrosa v. Carbon Black Export, Inc.* (1959) 359 U.S. 180, 3 L.Ed.2d 723, 79 S.Ct. 710, *reh. den.* 359 U.S. 999, 3 L.Ed.2d 986, 79 S.Ct. 1115; *Mitchell v. Oregon Frozen Foods Co.* (1960) 361 U.S. 231, 4 L.Ed.2d 267, 80 S.Ct. 365; *McGann v. United States* (1960) 362 U.S. 214, 4 L.Ed.2d 666, 80 S.Ct. 629; *Phillips v. New York* (1960) 362 U.S. 456, 4 L.Ed.2d 874, 80 S.Ct. 874; *Needleman v. United States* (1960) 362 U.S. 600, 4 L.Ed.2d 980, 80 S.Ct. 960, *reh. den.* 363 U.S. 858, 4 L.Ed.2d 1739,

(footnote continued on following page)

The dismissal of a writ of certiorari as improvidently granted has been ordered for a variety of reasons, all re-

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80 S.Ct. 1606; *Kimbrough v. United States* (1961) 364 U.S. 661, 5 L.Ed.2d 362, 81 S.Ct. 390, *reh. den.* 365 U.S. 825, 5 L.Ed.2d 703, 81 S.Ct. 688; *Bullock v. South Carolina* (1961) 365 U.S. 292, 5 L.Ed.2d 570, 81 S.Ct. 686; *Newsom v. Smyth* (1961) 365 U.S. 604, 5 L.Ed.2d 803, 81 S.Ct. 774; *Smith v. Butler* (1961) 366 U.S. 161, 6 L.Ed.2d 184, 81 S.Ct. 937, *reh. den.* 366 U.S. 941, 6 L.Ed.2d 852, 81 S.Ct. 1657; *Atchley v. California* (1961) 366 U.S. 207, 6 L.Ed.2d 233, 81 S.Ct. 1051; *Baldonado v. California* (1961) 366 U.S. 417, 6 L.Ed.2d 380, 81 S.Ct. 1355; *Hodges v. United States* (1961) 368 U.S. 139, 7 L.Ed.2d 184, 82 S.Ct. 235; *Benz v. New York State Thruway Authority* (1962) 369 U.S. 147, 7 L.Ed.2d 634, 82 S.Ct. 674; *Williams v. Zuckert* (1963) 371 U.S. 531, 9 L.Ed.2d 486, 83 S.Ct. 403, vacated 372 U.S. 765, 10 L.Ed.2d 136, 83 S.Ct. 1102; *Wolf v. Weinstein* (1963) 372 U.S. 633, 10 L.Ed.2d 33, 83 S.Ct. 969, *reh. den.* 373 U.S. 928, 10 L.Ed.2d 427, 83 S.Ct. 1522; *Smith v. Mississippi* (1963) 373 U.S. 238, 10 L.Ed.2d 321, 83 S.Ct. 1265; *Gotthilf v. Sills* (1963) 375 U.S. 79, 11 L.Ed.2d 159, 84 S.Ct. 187; *Dresner v. Tallahassee* (1964) 378 U.S. 539, 12 L.Ed.2d 1018, 84 S.Ct. 1895; *Mishkin v. New York* (1966) 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, *reh. den.* 384 U.S. 934, 16 L.Ed.2d 535, 86 S.Ct. 1440; *Cichos v. Indiana* (1966) 385 U.S. 76, 17 L.Ed.2d 175, 87 S.Ct. 271, *reh. den.* 385 U.S. 1020, 17 L.Ed.2d 559, 87 S.Ct. 699; *Gilbert v. California* (1967) 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951; *Massachusetts v. Painten* (1968) 389 U.S. 560, 19 L.Ed.2d 770, 88 S.Ct. 660; *Johnson v. Massachusetts* (1968) 390 U.S. 511, 20 L.Ed.2d 69, 88 S.Ct. 1155; *Palmieri v. Florida* (1968) 393 U.S. 218, 21 L.Ed.2d 389, 89 S.Ct. 440, *reh. den.* 393 U.S. 1045, 21 L.Ed.2d 596, 89 S.Ct. 611; *Conway v. California Adult Authority* (1969) 396 U.S. 107, 24 L.Ed.2d 295, 90 S.Ct. 312, *reh. den.* 396 U.S. 1030, 24 L.Ed.2d 527, 90 S.Ct. 544; *Jones v. State Board of Education* (1970) 397 U.S. 31, 25 L.Ed.2d 27, 90 S.Ct. 779, *reh. den.* 397 U.S. 1018, 25 L.Ed.2d 432, 90 S.Ct. 1230; *Taggart v. Weinacker's, Inc.* (1970) 397 U.S. 223, 25 L.Ed.2d 240, 90 S.Ct. 876; *Monks v. New Jersey* (1970) 398 U.S. 71, 26 L.Ed.2d 54, 90 S.Ct. 1563; *Moon v. Maryland* (1970) 398 U.S. 319, 26 L.Ed.2d 262, 90 S.Ct. 1730; *Odom v. United States* (1970) 400 U.S. 23, 27 L.Ed.2d 122, 91 S.Ct. 112, *reh. den.* 400 U.S. 984, 27 L.Ed.2d 396, 91 S.Ct. 363; *Piccirillo v. New York* (1971) 400 U.S. 548, 27 L.Ed.2d 596, 91 S.Ct. 520; *Bostic v. United States* (1971) 402 U.S. 547, 29 L.Ed.2d 102, 91 S.Ct. 2174, *reh. den.* 404 U.S. 875, 30 L.Ed.2d 122, 92 S.Ct. 32; *McClanahan v. Morauer & Hartzell, Inc.* (1971) 404 U.S. 16, 30 L.Ed.2d 136, 92 S.Ct. 170; *Duncan v. Tennessee* (1972) 405 U.S. 127, 31 L.Ed.2d 86, 92 S.Ct. 785; *Iowa Beef Packers, Inc. v. Thompson* (1972) 405 U.S. 228; 31 L.Ed.2d 165, 92 S.Ct. 859; *Sarno v. Illinois Crime Investigating Com.* (1972) 406 U.S. 482, 32 L.Ed.2d 243, 92 S.Ct. 1677; *Murel v. Baltimore City Criminal Court* (1972) 407 U.S. 355, 32 L.Ed.2d 791, 92 S.Ct. 2091.

More recent cases include *Jones v. Hildebrant* (1977) 432 U.S. 183, 53 L.Ed.2d 209, 97 S.Ct. 2283; *Ramsey v. New York* (1979) 440 U.S. 444, 59 L.Ed.2d 440, 99 S.Ct. 1415.

volving around the fact that in the final analysis, there was no dispute justifying the attention of this Court.[6]

As stated by co-authors Robert L. Stern and Eugene Gressman:

> "After certiorari has been granted, it may become apparent to the Court upon oral argument and upon further study that the basis upon which review was permitted is in fact non-existent. 'Examination of a case on the merits, on oral argument, may bring into proper focus a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident.' *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184. As stated by Mr. Justice Frankfurter in *Armstrong v. Armstrong*, 350 U.S. 568, 572 '[A]fter a case has been heard on the merits, it is to be disposed of on the precise issue that full study of the case discloses, and not on the basis of the preliminary examination of the questions that were urged in the petition for certiorari. Due regard for the working of the certiorari system requires this. In view of the fact that about 1,300 applications were made last term for leave to be heard . . ., determination during this sifting process of the jurisdictional merits in all these 1,300 cases can hardly be expected. Theory and practice alike reject any such notion. The inevitable cursory consideration that is normally given in a case

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[6]In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (fn. 2) (1955), the Court set forth an extensive list of cases in which writs had been dismissed as improvidently granted up to the time of that decision. The list was followed by a statement of the court as follows: "Only in the light of argument on the merits did it become clear in these numerous cases that the petitions for certiorari should not have been granted. In some instances an asserted conflict turned out to be illusory; in others, a federal question was wanting or decision could be rested on a non-federal ground; in a number, it became manifest that the question was of importance merely to the litigants and did not present an issue of immediate public significance."

on the preliminary round precludes the assumption that a tentative finding of a federal question will survive the thorough study of the record which consideration of a case on the merits implies.' "[7]

A review of the specific question to be considered by this Court, taken in totality with the entire background of this case, and particularly the decision of the Court of Appeals below, indicates that certiorari herein may have been improvidently granted.

This Court has made it clear that it wishes to limit its consideration herein, leaving nearly all of the Third Circuit's decision, and specifically its choice of law analysis, to stand unassailed. That choice of law analysis is extensive and thorough (JA 140-156), and it is clear that the law of the United States will apply to determine the rights and liabilities of the parties in this matter.[8]

In determining whether or not certiorari has been improvidently granted, this Court has not reached a decision in past instances without a careful examination of the totality of the circumstances surrounding each particular case. *Bullock v. South Carolina*, 365 U.S. 292 (1961); *Atchley v. California*, 366 U.S. 207 (1961); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Murel v. Baltimore City Criminal*

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[7]Supreme Court Practice, Fifth Ed., 1978 §5.15, p. 369, *et seq.*

[8]Specifically, the Court below determined that under the choice of law rules of California (the transferor state with respect to Piper), the strict liability standard of Pennsylvania should apply to that defendant (JA 149), and under the governmental interests analysis approach of Pennsylvania (applied to Hartzell, since the case against it had not been transferred pursuant to 28 U.S.C. §1404(a)), the strict liability standard of the United States, as embodied in the laws of either Ohio or Pennsylvania, should be applied as to that defendant. (JA 152, 155). (The Court's attention is directed to footnote 95 of the Third Circuit's opinion (JA 155), in which the Court indicated that should Ohio law apply to Hartzell, rather than Pennsylvania law to both defendants, "[g]iving separate charges on the Ohio standard for Hartzell and the Pennsylvania standard for Piper need not necessarily confuse the jury.").

Court, 407 U.S. 355 (1972). In *Phillips v. New York*, 362 U.S. 456 (1960), the Court stated:

> "After hearing oral argument and fully examining the record . . ., we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here." 362 U.S. at 460. (See also *Baldonado v. California*, 366 U.S. 417 (1961), where the totality of circumstances disclosed failed to support the substantial due process issues tendered in the petitions for certiorari.).

Once the Court has had an opportunity to fully examine a matter before it, it has often in the past become convinced that the writ it had previously granted should be dismissed. In *Belcher v. Stengel*, 429 U.S. 118 (1976), the Court was faced with determining whether an off-duty policeman had acted under "color of law" in breaking up a barroom brawl. Full consideration of the record showed that this question was groundless since evidence already introduced below indicated that the question had already been independently determined on several occasions by several means. The Court stated:

> "Now that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was considered, we have concluded that the writ should be dismissed as improvidently granted."
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> 429 U.S. at 119-120.

Similarly, in *Smith v. Butler*, 366 U.S. 161 (1961), the Court held that "[a]fter full argument and due consideration, it became manifest that the course of the litigation and the decisions in the [state] courts did not turn on the issue on the basis of which certiorari was granted." 366 U.S. at 161. Accordingly, the writ was dismissed.

The case of *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), is also instructive. In that case, this Court determined the propriety of its hearing a question of intellectual interest, but entirely devoid of any pithy meaning within the context of the underlying case. The Court stated:

> "A federal question raised by a petition may be 'of substance' in the sense that, *abstractly considered*, it may present an intellectually interesting and solid problem. *But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.* (*Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 67 L.Ed. 922, 924, 43 S.Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, September 7, 1949, 69 S.Ct. v, vi; Address of Mr. Chief Justice Hughes before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313). *Special and important reasons imply a reach to a problem beyond the academic or the episodic.*"
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> 349 U.S. at 74. (Emphasis added).

Similarly, in *Burrell v. McCray*, 426 U.S. 471 (1975), Mr. Justice Stevens spoke for the Court:

> ". . . just as the Court's broad control of its discretionary docket includes the power to dismiss the writ because circumstances disclosed by a careful study of the record were not fully apprehended at the time the writ was granted, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 183, 3 L.Ed.2d 723, 79 S.Ct. 1115, so also, we should retain the power to take like action when our further study of the law disclosed that there is no need for an opinion of this Court on the questions presented by the petition. Even though I agree with Mr. Justice Brennan that the questions in this case are important, I am nevertheless persuaded that the state of the law applicable to the facts disclosed by this

record is sufficiently clear that the dismissal of the writ is a permissible exercise of the Court's discretionary power."

423 U.S. at 472-473.

Similarly, if the judgment below is clearly correct on another ground, decision of the question upon which certiorari was granted may prove unnecessary. *Belcher v. Stengel*, 429 U.S. 118 (1976); *S.S. Monrosa v. Carbon Black Export*, 359 U.S. 180 (1959). Respondent respectfully submits that this is the circumstance now facing the Court. Since the decision below rests on choice of law, an analysis and decision by this Court on the question of the degree of favorability of foreign law toward the plaintiff is unnecessary and would serve no purpose.

The purely academic nature of the question extant can also be seen to overlap onto the principle of mootness. This is a clear violation of the rule that there must be an actual live controversy extant at all stages of appellate or certiorari review. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Although there is such a controversy as between the parties hereto with respect to the final rights and liabilities of each of them, as for an actual, live controversy with respect to the particular issue before the Court, it is clear that none exists.

This Court has also decreed that the interest of the public in a question before it may not be enough to warrant attention. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial."

S.S. Monrosa v. Carbon Black Export, supra, 359 U.S. 180, 184 (1959).

Further, if the full record in a matter does not reflect an adequate presentation of the question upon which certiorari was granted, the writ will be dismissed as improvidently granted. *McClanahan v. Morauer & Hartzell,* 404 U.S. 16 (1971); *Tyrrell v. District of Columbia,* 243 U.S. 1 (1917). In the present case, it can be seen that the entire record has dealt in the main with the traditional *Gilbert* factors determinative of a forum non conveniens motion. More specifically, choice of law issues based upon various interest analysis approaches has consumed much of the time and attention of the courts below in this matter. The question presently before this Court is unique herein for its novelty, and since there is a patently adequate ground for the decision of the Court of Appeals, there is no need for the matter to be heard anew.

The case of *U.S. v. Rimer,* 220 U.S. 547 (1911), though not one of this Court's more recent decisions, is nonetheless instructive. In that case the Court dismissed the writ, holding that the record and oral argument did not actually require the Supreme Court to decide the question which it had expected to answer when it granted certiorari. The Court stated that the petitioner had conceded during argument that a closer scrutiny of the record made it exceedingly doubtful whether the action of the court below dealt with the principle which was deemed to have rendered necessary the granting of the writ of certiorari. In a like manner, the Court dismissed a writ as improvidently granted in *U.S. v. McFarland,* 275 U.S. 485 (1927), holding that the writ should be revoked because a decision in the case did not require a decision of the questions which were presented in the petition for certiorari. The Court exercised its discretionary

power to so revoke the writ pursuant to *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924).

Finally, in *Layne and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923), the Court said that although certiorari had been granted on the ground that the Courts of Appeals for two circuits were in conflict, careful examination revealed that such decisions were really in harmony and not in conflict, and that there was thus no ground for allowing the writ. Certiorari was also revoked in *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931), the Court holding that it appeared that the asserted conflict in decisions arose from differences in states of fact and not in the application of a principle of law.

These cases indicate that the present situation calls for revocation of the writs of certiorari. The decision of the Court of Appeals below leaves empty the question now extant. Whether or not a plaintiff might defeat a motion to dismiss on the ground of forum non conveniens because the law of an alternative forum is less favorable to her cause of action than the law of the forum hearing the motion is irrelevant by reason of the choice of law analysis of the Court of Appeals. In addition, any purported conflict between the Second and Third Circuits fails to take into account two factors: First, *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), cert. denied, 435 U.S. 904 (1978), held that the command in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), that a transfer pursuant to 28 U.S.C. §1404(a) not result in a change in the applicable law, was likewise applicable to a forum non conveniens dismissal (562 F.2d at 899). This holding still prevails and remains unrepudiated. Thus, all Circuits should, at the very least, take this decision into account when the facts before them so warrant. Second, the facts of an individual case cannot be considered in a vacuum with respect only to the law of the alternate

forum vis á vis the law of the forum hearing the matter. Rather, each of the *Gilbert* factors, juxtaposed with the facts of the particular case, must be considered before a determination one way or another can be reached.

Therefore, Respondent respectfully submits that when each of the cases in which there is an apparent conflict between Circuits is analyzed, it becomes manifest that in each instance the court acted correctly precisely because a balancing of *all* of the *Gilbert* factors indicated only one clear choice.

The assertions of Petitioners herein that the Court of Appeals based its entire decision on the favorability to the plaintiff of United States law and the unfavorability of the law of Scotland thereto, simply fail to take into account the massive balancing process in which the Third Circuit engaged before reaching its decision in this matter. Furthermore, that balancing process was justified, since it was clear to the Court that the District Court had abused its discretion in not holding the defendants to their proper burden. (JA 131, 156).[9]

The irrefutable fact of this matter is that the basis for the Court of Appeals' decision was choice of law. Thus, however this Court decides the singular question now before it, the result is the same: United States law as applied by the Circuit Court will govern this controversy. Further, because choice of law is such an important component of the doctrine of forum non conveniens, it is highly unlikely that the Dis-

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[9]See *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), in which the court stated: "'As this court concluded in *Founding Church of Scientology v. Verlag* (536 F.2d 429, 436 [D.C. Cir. 1976]): 'A trial judge has great but not unlimited discretion to apply the doctrine of forum non conveniens. Where there has been no weighing of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused.' " 637 F.2d at 783.

trict Court upon remand will refrain from accepting jurisdiction, in view of the fact that this country's law is to be applied, pursuant to the dictate of the Court of Appeals.[10] The writs of certiorari herein were, therefore, improvidently granted and should be revoked.[11]

II.

Important Considerations Support the Principle That the Plaintiff's Choice of a Forum Should Rarely Be Disturbed.

In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the Court set forth a threshold consideration to be weighed in determining the merits of a motion grounded upon the doctrine of forum non conveniens. The point was made at the very beginning of the Court's opinion, thereby lending to it the importance which in the Court's estimation it deserved. The language concerning the plaintiff's choice of a forum was as follows:

> "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of

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[10]In *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), the court first set forth the principle that where it is determined that foreign law applies, the United States court is free to retain or refuse jurisdiction. The court then said: "However, for similar forum non conveniens reasons, if United States law is applicable, the American court should retain jurisdiction rather than relegate the controversy to a foreign tribunal." 628 F.2d at 315. See also *Antypas v. Cia. Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 443 (2nd Cir. 1959), cert. denied, 359 U.S. 1000 (1959); *Mattes v. National Hellenic American Line, S.A.*, 427 F.Supp. 619, 629 (S.D.N.Y. 1977).

[11]An instructive and comprehensive annotation on this subject is entitled "When Will Supreme Court Dismiss Writ of Certiorari as Improvidently Granted", Sheldon R. Shapiro, J.D., 30 L.Ed.2d 829.

courts, so that he may be quite sure of some place in which to pursue his remedy . . . It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. at 507-508.

With few variations,[12] this consideration, announced at the outset by the Supreme Court in *Gilbert*, remains paramount whenever courts consider a forum non conveniens issue.[13]

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[12]Petitioners have weakly attempted to argue that this consideration should be relegated to minor status when the real party in interest is not an American citizen. (Brief on the merits for Piper, p. 18, *et seq.*; Brief on the merits for Hartzell, p. 13, *et seq.*). However, as the Court of Appeals pointed out, "The district judge believed that the plaintiff's choice of forum is of diminished significance, and the defendants' burden of showing inconvenience correspondingly less, when the plaintiff — more precisely, the real parties in interest — is foreign or when the forum chosen is not the plaintiff's home ground. *Neither of these burden-shifting principles may be found in opinions of the Supreme Court or this Court.*" (JA 129). (Emphasis added).

[13]*Lehman v. Napier*, 101 F.Supp. 313, 316-317 (D.C. Iowa 1951); *Collins v. American Automobile Ins. Co. of St. Louis, Mo.*, 128 F.Supp. 228, 230 (D.C.N.Y. 1955); *Molloy v. Bemis Bro. Bag Company*, 130 F.Supp. 265, 267 (D.C.N.Y. 1955); *Medich v. American Oil Company*, 177 F.Supp. 682, 683 (D.C. Pa. 1959); *Rogge v. Menard County Mutual Fire Ins. Co.*, 184 F.Supp. 289, 292 (D.C. Ill. 1960); *Zelman v. Bethlehem Steel Company*, 186 F.Supp. 246, 248 (D.C. Pa. 1960); *Vandusen v. J.C. Penney Co.*, 207 F.Supp. 529, 533, 534, 536 (D.C. Ark. 1962); *Daquila v. Schlosberg*, 253 F.2d 888, 889 (D.C. Cir. 1958); *Blue Bell, Inc. v. Jaymar-Ruby, Inc.*, 311 F.Supp. 942, 943-44 (D.C.N.Y. 1969); *Bartolacci v. Corp. of Presiding Bishop, Etc.*, 476 F.Supp. 381, 383 (D.C. Pa. 1979); *Burbank Intern. Ltd. v. Gulf Con. Intern., Inc.*, 441 F.Supp. 819, 822 (D.C. Tex. 1977); *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 453 F.Supp. 10, 11 (D.C.N.Y. 1978); *Mizokami Bros. of Arizona v. Mobay Chemical Corp.*, 483 F.Supp. 201, 206 (D.C. Mo. 1980); *Bolanos v. Gulf Oil Corp.*, 502 F.Supp. 689, 690 (W.D. Pa. 1980); *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970); *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 312 (5th Cir. 1980); *Paper Operations Consultants International, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667, 671 (9th Cir. 1975); *Olympic Corporation v. Societe Generale*, 462 F.2d 376, 378 (2nd Cir. 1972); *Stevenson v. U.S.*, 197 F.Supp. 355, 358 (D.C. Tenn. 1961): "The right of a plaintiff to choose his forum, the law allowing an alternative, is recognized as a valuable right of choice which should not be disturbed in the absence of strong reasons therefor."

Indeed, the concept of the plaintiff being allowed his choice of location in bringing suit is fundamentally tied to the concepts of balancing and the burden on the defendant, both of which are inherent in the doctrine of forum non conveniens. In *Paper Operations Consultants International, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975), the Court reiterated the factors set forth in *Gilbert* which must always be considered, then stated:

> "The court in *Gulf Oil Corp.* cautioned that in considering these and other factors, the plaintiff's choice of forum should 'rarely be disturbed' unless the balance is strongly in favor of adjudicating the matter in another forum." 513 F.2d at 671.

Any restriction upon the plaintiff's original choice is to be arrived at only after this careful balancing process has been completed. *Gulf Oil Corp. v. Gilbert, supra*, 330 U.S. at 507-508; *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666 (D. Del. 1980). In *Schilling-Hillier S.A.I.E.C. v. Virginia-Car. Chem. Corp.*, 19 F.R.D. 271 (S.D.N.Y. 1956), the Court held:

> "In *Gulf Oil Corp. v. Gilbert*, . . . the Supreme Court declared that 'unless the balance [of convenience] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'. This was interpreted by the Court of Appeals for this circuit to mean that the defendant 'has the burden of making out a strong case for a transfer' which overweighs not only the convenience of the plaintiff but the right of the plaintiff to choose his forum. *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir. 1950)." 19 F.R.D. at 272.

Furthermore, if bringing the matter in another forum would merely shift the convenience from one party to the other, dismissal is not justified to overturn the plaintiff's original choice:

> "The facts of this case present what has been described as an 'equitable standoff'; both parties are likely to suffer roughly equal inconvenience. Under such circumstances, the transfer to another forum would merely shift the inconvenience from the defendants to the plaintiffs. Consequently, the plaintiffs' choice of forum should not be disturbed. (Citations omitted)." *Lieb v. American Pac. Intern., Inc.*, 489 F.Supp. 690, 697 (D.C. Pa. 1980).

In *Cheeseman v. Carey*, 485 F.Supp. 203 (D.C.N.Y. 1980), the court considered the plaintiff's right to choose a forum in connection with the dangers of forum shopping:

> "A court seeking reasons for choosing one or the other of these conflicting doctrines [i.e., deference accorded plaintiff's choice vs. forum shopping] is inevitably led to Mr. Justice Jackson's analysis of the doctrine of forum non conveniens in *Gulf Oil Corp. v. Gilbert* (citation omitted). Forum shopping is no more an evil than any other tactical determination a party makes in its behalf. Any competent lawyer chooses a forum with his or her client's interests in mind. This is undoubtedly why Justice Jackson made clear that a party had to do more than forum shop to justify invoking forum non conveniens; the choice of forum must have been made with some harassment in mind to have justified dismissal of the action." 485 F.Supp. at 215.

Finally, two other points have been made by the courts which presage the retention of litigation in the forum of the plaintiff's original choice. In *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666 (D. Del. 1980), the court held:

> "Finally, at least two miscellaneous considerations support the denial of defendant's motion. First, Delaware is the state in which two of the defendants are incorporated; an especially strong showing is required to support a forum non conveniens motion where plaintiff has ceded defendants the 'home turf' advantage.

> *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. at 453.[14] Second, a particularly strong showing of vexatiousness, harassment, or oppression is required where defendant's economic capabilities are disproportionately greater than plaintiff's. . . . *D'Angelo v. Petroleos Mericanos*, 398 F.Supp. 72, 84 (D. Del. 1975). On the basis of these considerations . . . it is apparent that plaintiff in this case should not be denied the forum of his choice." 85 F.R.D. at 673.[15]

It is clear from the above that the plaintiff's choice of a forum is to be accorded great weight as mandated by *Gilbert* and its progeny. However, beyond all of the traditional, irrefuted and irrefutable arguments for granting such weight to the plaintiff's selection, there is yet another, highly just and desirable benefit to be accomplished by this accord: A defendant, be it individual or business entity, will in this way be held to the highest possible standard of accountability for his purported wrongdoing.

Like many American companies, the defendant manufacturers herein disseminate their products on a world-wide basis.[16] To allow such defendants to use the forum non

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[14]The fact that plaintiff had already ceded this advantage once, because of the previous motions of defendants in California, was not lost on the Court of Appeals, which held that the previous transfer served to add to the defendants' burden on the present motion. (JA 120-124).

[15]It is apparent that both of these factors are applicable in the case extant. Piper Aircraft Corp. is a Pennsylvania corporation, while Hartzell Propeller, Inc. is an Ohio corporation. (JA 119). Further, it goes without saying that their economic capabilities far exceed those of the nearly destitute Scottish heirs who are the real parties in interest.

[16]As stated by C.O. Miller in his article entitled "Aviation Accident Investigation: Functional and Legal Perspectives", *Journal of Air Law and Commerce*, Vol. 46, 1981, p. 283: "The interest of the United States in [foreign accidents] is extensive because of its citizens' predominance in the manufacture of aircraft used throughout the world. Ninety to ninety-five percent of the free world's air carrier aircraft bear the labels of American companies as do about eighty percent of the free world's general aviation aircraft. Furthermore, United States carriers and aviation corporations operate in all corners of the globe."

conveniens vehicle to override the plaintiff's choice of a forum is to allow them to escape their responsibility for competent and careful manufacturing practices. In the present instance, the defendants are seeking to hide behind the fact of the real parties' in interest foreign citizenship to obviate their responsibilities as perpetrators of defective products which lead to injury and death, and further to obviate the fact that recompense is due and owing, no matter where the plaintiffs reside.

Respondent does not attempt to hide the fact that her prospective recovery in the courts of the United States is much greater than in those of Scotland. It is openly conceded that the choice of a United States forum was made precisely because the jurisdictions in this country allow the cause of action for strict liability for manufacture of defective products and the cause of action for wrongful death while in Scotland, the sole basis upon which an aggrieved plaintiff can recover in a case such as this is a survival action based on negligence. The principles of strict liability accepted by courts in the United States are not so accepted under Scottish law.[17]

While it may be true that a plaintiff will always seek the forum with the most favorable law, it is clear that within that concept of what is "favorable" is included a standard or standards of conduct such that a defendant will be held more highly accountable therein than he would be in a supposedly "unfavorable" forum. Thus, to advance the plaintiff's choice is to advance a highly desirable objective and public policy.

Defendant-manufacturers, then, are eager to avoid being held answerable for wrongdoing in American courts apply-

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[17]Scotland Law Digest: Death; Martindale-Hubbell Law Directory, Vol. VIII, 1981, p. 4101.

ing American law. The reason is obvious. Monetary judgments tend to be considerably higher under the laws of courts in the United States than in other forums. To force the present plaintiff, as well as other similarly situated plaintiffs, into a foreign jurisdiction will preclude her from bringing causes of action to which she is rightfully entitled. It can only be concluded that Petitioners desire to have this matter heard in such a jurisdiction precisely because of the limitation on applicable causes of action, as well as the unavoidable fact that Petitioners stand to have a larger monetary judgment entered against them here.

The result, then, is a "two-way street". Sacrifice the plaintiff's choice of a forum and we sacrifice the high standard to which a defendant might prospectively be held. Maintain the weight long accorded the plaintiff's choice, and we simultaneously maintain higher standards which manufacturers and other disseminators of products must meet.[18] The latter, obviously, is the more favorable alternative.

The Court below concluded that the defendants had not met their burden in demonstrating that the balance of equities and the balance of the other *Gilbert* factors should swing in their direction. In reaching that conclusion, it gave the proper weight to the plaintiff's choice of forum, juxtaposing alongside that choice the other relevant factors as outlined by the Court in *Gilbert* and its offspring. The outcome was that the plaintiff's choice was not inconvenient, and that her selection of a forum should stand. Respondent respectfully submits that the court acted correctly in weighing each of

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[18]This, of course, is the concept of deterrence of wrongful conduct. [*Ryan v. Clark Equipment Co.*, 268 Cal.App.2d 679, 74 Cal.Rptr. 329 (1969); *Hurtado v. Superior Court*, 11 Cal.3d 574, 522 P.2d 666 (1974)]. In its choice of law analysis, the Court of Appeals dealt substantially with this concept (JA 147-149), reaching the conclusion that Scotland would have absolutely no interest in applying its own law to this matter, since it domiciled neither of the allegedly wrongdoing manufacturers.

the applicable factors and in according the plaintiff's choice its proper value and significance.[19]

III.

The Requirement That an Alternative Forum Be Available to Plaintiff Under the Doctrine of Forum Non Conveniens Includes a Remedy and Law Which Are Acceptable and Adequate.

Along with setting forth the importance of the plaintiff's choice of a forum, and indeed even prior thereto, the Supreme Court in *Gulf Oil Corp. v. Gilbert, supra,* stated that the doctrine of forum non conveniens absolutely requires the availability of an alternative forum in which an aggrieved plaintiff might seek his remedy, before a motion grounded upon the doctrine could be granted. The court set forth the relevant language in this regard as follows:

> "In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." 330 U.S. at 506-507.

This requirement has been carefully heeded so that when a plaintiff, truly wronged, has nonetheless chosen an inconvenient site for litigation, he may still be assured of his day in court — somewhere. (*DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977); *Calavo Growers of California v. Belgium*, 632 F.2d 963, 968 (2d Cir. 1980); *Fosen v. UTC*, 484 F.Supp. 490, 503 (D.C.N.Y. 1980).)

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[19]Granting the plaintiff's choice the weight properly due it does not seem to result in a burgeoning amount of litigation foisted upon the American judicial system. Indeed, the concern of the *Gilbert* court was apparently that American courts might too often eschew jurisdiction, a fear which it at one and the same time announced and put to rest: "The doctrine [of forum non conveniens] leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." 330 U.S. at 508.

In *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666 (D.C. Del. 1980), the court made clear the importance of this principle:

> "Under no circumstances, however, according to Gilbert and subsequent cases, may a court dismiss an action under the doctrine of forum non conveniens unless an adequate alternative forum exists. *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 506-507. See also *North Branch Products, Inc. v. Fisher*, 109 U.S. App. D.C. 182, 284 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 827, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961); *Domingo v. States Marine Lines*, 340 F.Supp. 811 (S.D. N.Y. 1972); *J.F. Pritchard & Co. v. Dow Chemical of Canada, Ltd.*, 331 F.Supp. 1215 (W.D. Mo. 1971), *aff'd* 462 F.2d 998 (8th Cir. 1972)." 85 F.R.D. at 670.

Further, demonstration of the existence of an alternative forum is part of the defendant's general forum non conveniens burden. *Fosen v. UTC, supra*, at p. 503; *Schertenleib v. Traum*, 589 F.2d 1156, 1160 (2d Cir. 1978).

The Court in *Gilbert* did not elaborate on the concept of an alternative forum, so as to make clear what constituted an acceptable alternative. However, several courts have since come to the conclusion that included therein of necessity are an adequate remedy and law, so that forcing plaintiff out of the forum originally chosen will not completely deprive him of the rights and advantages he sought there.

In *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (D.C. Del. 1978), the court dealt at length with the *Gilbert* mandate requiring an alternative forum, and the ramifications thereof, speaking as follows:

> " 'A prerequisite to dismissal under the doctrine of forum non conveniens is the existence of an alternative forum where plaintiff can litigate his claims.' *Wan v. Avis Rent A Car System, Inc.*, No. 75-28 (D. Del. Jan.

20, 1976) (Memorandum Opinion) (footnote omitted). '[T]he action will not be dismissed unless a suitable alternative forum is available to the plaintiff.' Restatement (Second) of Conflict of Laws §84, Comment c (1971). 'That there is an alternative forum that will take jurisdiction of the case *and where plaintiff can get the relief he would get in the federal court must clearly appear before dismissal can be ordered.*' C. Wright, Law of Federal Courts 186 n. 23 (1976). *'Limitation upon or denial of recovery is in and of itself grounds for not dismissing on forum non conveniens grounds.' Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 458 (2d Cir. 1975) (Oakes J., dissenting), *cert. denied*, 423 U.S. 641 (1976).

"That the Third Circuit Court of Appeals believes the existence of a suitable alternative forum to be critical is boldly demonstrated in this passage from *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945, 87 S.Ct. 318, 17 L.Ed.2d 225 (1966):

> 'The issue of convenience aside, the more important question is whether the relinquishment of jurisdiction would best serve the ends of justice. The court below seemed to think that it would, but with this we cannot agree. There is no evidence in the record that the retention of jurisdiction would seriously prejudice [defendant]. *However, the relinquishment of jurisdiction could result in serious detriment to [plaintiffs'] causes of action.* It would relegate the libelants to a foreign forum in which the procedural remedies are far less conducive to the fair administration of justice than those available under our admiralty rules. . . .'

"Thus the Third Circuit has apparently endorsed the concept that not only must an alternative forum exist, *and not only must that forum provide relief for the actions alleged to violate United States law*, but the

> alternate forum must also provide comparable procedural protections to those in the United States. This Court needs not hold as much. Sufficient doubt arises with respect to the existence of an alternative forum and *the availability of relief for the alleged actions* to justify a decision not to dismiss the case without resort to a comparison of alternative procedural safeguards."
>
> 78 F.R.D. at 455. (Emphasis added).[20]

The court went on to discuss factual considerations with respect to the particular circumstances then before it, and stated:

> "Finally, even if an Ecuadorian tribunal will hear the case, jurisdiction is had over all defendants, and plaintiff financially is able to proceed in Ecuador, it appears that no generally codified Ecuadorian legal remedy exists for unjust enrichment or the tort claims asserted here."
>
> 78 F.R.D. at 456.

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[20]It should be noted that not only does Scotland severely limit the causes of action available to a plaintiff, but its procedural safeguards are also stringently circumscribed when compared to United States discovery procedures. In preparation for the hearing of this case before the Court of Appeals, counsel for then-Appellant Reyno spoke telephonically with Scottish attorney Michael J. R. Simpson, of Tods, Murray & Jamieson in Edinburgh. He informed us that Scottish courts do not recognize interrogatories as we know them in the United States. Only if a witness is unable to attend the trial of the matter is counsel allowed to submit questions in written form, somewhat akin to interrogatories, to that witness, and then only at such a late date as to be immediately prior to trial. Counsel is thereby unable to gather any information, study it and determine its usefulness and validity until such time as to be severely handicapped in the review of such material. With respect to documents held by non-parties in the case, they may be obtained only if shown relevant and then only in the event a court order is obtained, certifying that good cause exists therefor. Again, counsel may be seen to be extremely limited in the free flow and exchange of vital discovery material, a limitation which he is not required to suffer in the United States, where discovery procedures are liberal and far more elastic. It may be seen, therefore, that Petitioners and Respondent alike will suffer from the rigorous controls imposed on discovery if this matter is brought to trial in Scotland.

Such is the situation here. Since Scotland recognizes no causes of action for wrongful death and strict products liability, it is evident that defendants' assertions that that country presents an acceptable alternative forum are unfounded. To force Respondent into the courts there would do more than deny her a higher monetary recovery; such a move would be tantamount to the denial of basic rights which exist here in the United States. There is, therefore, no acceptable alternative forum as mandated by *Gilbert*.

The *Phoenix* court went on to consider and reject the applicability of *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956), *cert. denied*, 352 U.S. 871, 77 S.Ct. 96, 1 L.Ed.2d 76 (1956). In *Vanity Mills*, a dismissal based on forum non conveniens was granted. The Canadian justice system had already rendered certain decisions concerning the trademarks in issue and it was not disputed that plaintiff could obtain fair adjudication in Canada. The Second Circuit examined relevant Canadian law to assure existence of a legal remedy. The *Vanity Mills* Court stated:

> "Were this merely a transitory tort action in which disputed facts could be litigated as conveniently here as in Canada, we would think the jurisdiction of the district court should be exercised. But we do not think it the province of United States district courts to determine the validity of trade-marks which officials of foreign countries have seen fit to grant."
>
> 234 F.2d at 647.

In concluding, the *Phoenix* court determined that the United States forum should retain jurisdiction:

> "In the case at bar, there is (1) an alleged connected tort action that can be litigated here; and (2) the absence of a clear issue under a developed body of foreign law hinging upon a previous determination under that foreign law. For these reasons, *Vanity Mills* is not dispositive of this action."
>
> 78 F.R.D. at 457.

These cases clearly indicate that the existence of an alternative forum, the sine qua non set forth in *Gilbert*, is not simply an abstract concept. Rather, before another jurisdiction can be considered as a possibly acceptable alternative, the defendant moving for dismissal based upon forum non conveniens must demonstrate that an adequate remedy and law are available in the second forum, so that plaintiff might enjoy substantially the same rights and prospects for recovery as he would have in the original court. In other words, as set down by the Third Circuit in *DeMateos v. Texaco, supra*, even a forum non conveniens dismissal must result only in a change of courts, and not also in a change of law, rights and liabilities. (562 F.2d at 899). See also *Chirinos de Marin (Alvarez) v. Creole Petroleum Corp.*, 613 F.2d 1240 (3d Cir. 1980).

Both Petitioners herein have relied on *Dahl v. United Technologies Corp.*, 472 F.Supp. 696 (D.C. Del. 1979),[21] urging that the facts therein are so substantially similar to those of the case now at bar that the Third Circuit should have followed the example of the *Dahl* court in dismissing on the ground that the foreign forum is far more suitable for the trial of this matter. Petitioners' reliance is misplaced.

The *Dahl* case involved the crash of a Norwegian owned and operated helicopter in Norwegian waters. The four Norwegian nationals aboard were killed. Acting upon a motion based upon forum non conveniens, the American court, prior to turning to the merits of the motion, considered the applicability of *Phoenix Canada Oil Co. v. Texaco, Inc., supra*, but rejected the holding therein. Precisely because an almost identical remedy was permitted under Norwegian law, the court concluded that Norway presented an acceptable alternative forum, and went on to dismiss the

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[21]Brief for Petitioner Hartzell, pp. 11, 12, 17, 30, 34; Brief for Petitioner Piper, p. 30.

matter because of this and other traditional forum non conveniens factors. The court's language is of crucial importance in the case now under consideration:

> ". . . the plaintiffs argue that Norway is not an acceptable alternative forum because there is no evidence that it will afford them *remedies* or procedural protections comparable to those available in the United States. The record, however, refutes that argument. UTC has filed an affidavit by a Norwegian attorney which indicates that . . . under Norwegian law UTC would be subject to *unlimited liability* for injuries and damages resulting from the helicopter crash shown to have been caused by its negligence. The affidavit also states: 'Norway is in the process of developing case law built up around product liability cases' . . . Accordingly, the Court finds that Norway is a suitable alternative forum and turns to the merits of the defendant's motion." 472 F.Supp. at 699. (Emphasis added).

See also *Fosen v. United Technologies Corp.*, 484 F.Supp. 490, 504 (S.D.N.Y. 1980).

That the *Dahl* court gave primary consideration to the suitability of the proposed alternative before turning to the motion on the merits is significant. As did the court in *Gilbert*, the *Dahl* court realized that such a question is of threshold importance, and that a determination in this respect must be made before the court can go on to the other *Gilbert* factors. Should the alternative forum not be found suitable, the case must remain in the original court. *Fosen v. United Technologies Corp., supra*, 484 F.Supp. 490 (S.D.N.Y. 1980).

In the present case, it is clear that plaintiff will suffer great prejudice of her right to bring certain causes of action if this matter is forced to trial in Scotland. Unable to prosecute causes of action for wrongful death and strict products

liability, and limited solely to proving negligence, she will be denied fundamental rights granted her under American law. On this basis alone, all considerations of the amount of any possible recovery aside, it is obvious that Scotland does not rise to the status of an acceptable alternative forum. Even before any of the merits of the Petitioners' arguments are heard, it is impossible for them to successfully proceed past the threshold directive of this Court in its decision in *Gulf Oil Corp. v. Gilbert* that such an alternative be found. For this reason, this matter must, under any notions of justice and fairness, proceed in the courts of the United States.

Conclusion.

For all of the foregoing reasons, it is respectfully submitted that the decision and order of the Court of Appeals for the Third Circuit were correct, and that this matter should be remanded to the United States District Court for the Middle District of Pennsylvania for trial.

Dated: July 10, 1981.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARTZELL PROPELLER, INC.,
Petitioner,

v.

GAYNELL REYNO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

[Consolidated for Argument with No. 80-848]

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August 14, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-883

HARTZELL PROPELLER, INC.,
Petitioner,

v.

GAYNELL REYNO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

[Consolidated for Argument with No. 80-848]

REPLY BRIEF FOR PETITIONER HARTZELL PROPELLER, INC.

I

MATTERS NOT IN ISSUE

Respondent does not challenge or even address the greater part of petitioner Hartzell's principal brief (hereinafter "Hz. Br. ——").[1] We find no dispute of the following specific points:

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[1] Petitioner Hartzell did not consent to the filing of either of the two briefs *amicus curiae* that have been filed, and does not share some of the views expressed in the brief filed by the *amici* in support of petitioners.

1. Respondent does not contest that at common law and in admiralty a *forum non conveniens* dismissal was not barred by the prediction that the alternative forum would apply law less favorable to the plaintiff [Hz. Br. 19-23]. Indeed neither *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), nor the numerous cases and articles supporting its result, are so much as mentioned by respondent.

2. Respondent voices no disagreement with the proposition that *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), requires a discretionary balancing of *all* factors relating to the convenience of the litigation [Hz. Br. 24-27]. Indeed, she considers it useful at one point to urge this point herself [Resp. Br. 18].[2]

3. The settled rule that the district court may be reversed only for abuse of discretion [Hz. Br. 11-13] receives no adverse comment by respondent.

4. There is no dispute, but rather agreement [Resp. Br. 20, 24], that the real parties plaintiff are foreign [see Hz. Br. 14-15].

5. Apart from her claim that the Court of Appeals' decision on choice of law is beyond review [see, *e.g.*, Resp. Br. 7, 17-18], respondent makes no effort to justify in state law the intuition of the Court of Appeals as to the "governmental interests" of Pennsylvania or Ohio [Hz. Br. 35-44].

6. Finally, respondent does not disclaim but expressly acknowledges that she brought suit in the United States because she wished to take advantage of the usual American rule of strict liability and because she believes that in this country "monetary judgments tend to be considerably higher" [Resp. Br. 24-25; see Hz. Br. 44-48].

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[2] Her argument [Resp. Br. 19-26] as to the controlling effect of the plaintiff's choice of forum is, of course, inconsistent with the discretionary evaluation of all factors mandated by *Gilbert*.

We turn, accordingly, to the few points that respondent *has* put in issue.

II

THE WRIT WAS NOT IMPROVIDENTLY GRANTED

Respondent's suggestion that the writ of certiorari should be dismissed as improvidently granted seems to reflect a desire to avoid an adverse judgment that is plainly warranted on the merits. The reasoning supporting the suggestion is by no means clear, but seems to be that the decision below "rests on choice of law" [Resp. Br. 7, 15]. Respondent states that "[w]hether or not a plantiff might defeat a motion to dismiss on the ground of forum non conveniens because the law of an alternative forum is less favorable to her cause of action than the law of the forum hearing the motion is irrelevant by reason of the choice of law analysis of the Court of Appeals" [*id.* 17].[3] Respondent misreads the opinion below.

Obviously, the Court of Appeals, in holding against dismissal on the ground that it would "work a change

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[3] Respondent also suggests obliquely that, whatever may be this Court's decision of this case, the holding of *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), "still prevails and remains unrepudiated" [Resp. Br. 17; see also *id.* 6]. The point is difficult to understand. In holding as it did, the Court of Appeals followed its prior ruling in *DeMateos* that a dismissal for *forum non conveniens* should not work a change in the applicable law; that is the very ruling now before this Court. (It did not lead to reversal of the *forum non conveniens* dismissal in *DeMateos* because the Third Circuit there agreed with the district court that foreign law would govern wherever the case was tried.) Far from being "as yet unassailed" [Resp. Br. 5], the *DeMateos* ruling (insofar as it is applied to cases not involving the Jones Act, 46 U.S.C. § 688, or other federal statute that is interpreted to confer mandatory federal court jurisdiction, see Hz. Br. 34 n.50), is in square conflict with the rulings of the Second Circuit and is challenged by petitioner herein.

in the applicable law" [A 139], had to conclude or accept that the United States court would indeed apply different law than would a Scottish court.[4] Here, it determined that whereas "Scotland probably would apply its own law to all claims" [A 139], "American" law would govern if the suit were tried here [A 139-156].[5] Thus, the Court of Appeals followed its earlier statement in *DeMateos* "that a dismissal for forum non conveniens, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law,'" and squarely held: "Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified."[6]

The principle that dismissal for *forum non conveniens* will not be permitted if it deprives the plaintiff of "the

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[4] The actual order of the Court of Appeals' analysis does not determine whether one or another of its component steps is properly characterized as "holding" or "dictum". In essence the Court of Appeals held that (a) if there may be a change in law there can be no dismissal [A 139-140] and (b) here, there would be such a change in law [A 144-149, 152-155]. The court might just as well have said (a) there would be a change in law, so (b) there could be no dismissal. The change in law ruling is equally necessary to the decision whether stated first or last.

[5] We have shown in our opening brief that the ruling below both was patently wrong as to the Pennsylvania choice of law and was derived in violation of the deference to state law required by *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). If the Court of Appeals had concluded that Scots law would be applied by the Pennsylvania as well as by the Scottish courts, it would not have had occasion to apply the erroneous principle that dismissal may not be granted if a change in law would result.

[6] A 139-140 (footnote omitted) (quoting *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)).

benefit of the claim to which she is entitled here" [A 140] thus was essential to the Court of Appeals' decision. Respondent's suggestion that "the full record . . . does not reflect an adequate presentation of the question upon which certiorari was granted" [Resp. Br. 16] is frivolous.[7]

III

RESPONDENT HAS NO RIGHT TO THE FORUM WHERE SHE EXPECTS TO MAXIMIZE HER PROSPECTS OF RECOVERY

There runs through respondent's arguments a conviction that the judicial system can operate fairly only when it produces the maximum prospect of recovery for the plaintiff and the largest liability for the defendant. We, to the contrary, have supposed as a general proposition that the judicial system is supposed to be neutral as between plaintiff and defendant. We submit that none of respondent's arguments for the virtual inviolability of her choice of forum could appeal to a neutral tribunal.

1. It must be remembered, despite the complexity of the opinion below, that this is a very simple case. The

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[7] It also contradicts respondent's earlier position in this Court. When she filed her brief in opposition to the petition for certiorari, respondent unequivocally stated [Br. in Opp. 4-5 (emphasis added)]:

> "The Court of Appeals reversed the District Court and *held* that a dismissal by the American court would result in a change of applicable law, *the very prospect of such a change and its consequences thereby precluding dismissal.*
>
> * * * *
>
> "This holding was initially enunciated in *DeMateos* v. *Texaco, Inc.*, which reflected the landmark decision of *Van Dusen* v. *Barrack* by this Court that a transfer under 28 U.S.C. § 1404(a) should not work a change in applicable law as determined by the transferor court."

accident occurred in Scotland. All the real parties plaintiff are Scottish. Three defendants concerned with the maintenance and operation of the aircraft can be sued only in the United Kingdom and already are being pursued there by the relatives of the decedents whose estates respondent represents. Witnesses as to the maintenance of the aircraft and the inexperience of the pilot, and the wreckage itself, are not subject to the process of an American court. We urge that according to common sense and elemental fairness this cannot be anything but a Scottish case, and that the Court of Appeals lost sight of simple basics in the complexity of its analysis.

2. We do not dispute the presumption that attaches to a plaintiff's choice of forum, especially his home forum. This has consistently been recognized from *Gilbert* onward. But under the traditional approach this presumption is greatly weakened when the plaintiff is a foreigner who has journeyed to the forum to seek expected litigation benefits her own country does not provide [Hz. Br. 15].[8] The presumption favoring the plaintiff's choice has, moreover, largely been eroded, whether the plaintiff is American or foreign, in the more recent decisions of three Circuits [see *id.* 16-17].

But respondent's position is even more fundamentally flawed. The traditional deference accorded a plaintiff's choice of forum has never been intended to guarantee a plaintiff, or preserve for his benefit, his selection of the law that will govern the case. As Professor Currie has stated, "one of the prime considerations in forum-shopping has always been the search for a more favorable law, and one of the grounds for invoking the doctrine of *forum non conveniens* has always been that the plaintiff, in the choice of the forum, sought to obtain an inequitable advantage in terms of the law which the forum would apply." Currie, *Change of Venue and the Con-*

[8] The sum of respondent's answer on this point [Resp. Br. 20 n.12] is a quotation from the opinion of the Court of Appeals.

flict of Laws, 22 U. Chi. L. Rev. 405, 444 (1965). The advantage, usually allowed to the plaintiff, is deemed inequitable once the court has determined that the criteria for dismissing for *forum non conveniens* are satisfied, for such a determination essentially signifies that the plaintiff has misused the privilege of forum selection by choosing a forum outside the range of appropriate forums. *Cf.* Hz. Br. 21-22 n.32.

There is no merit, therefore, to the notion that a dismissal that may lead to the application of law less favorable to the plaintiff is precluded on the ground that it will deprive the plaintiff of an advantage, in terms of available causes of action or otherwise, to which she is "rightfully entitled" [Resp. Br. 25]. To characterize the advantage in such terms is to beg the question. There exists no such unqualified "right" of forum selection, or else there would be no doctrine of *forum non conveniens* at all.

3. Respondent attempts to buttress her argument in favor of an unreviewable right to sue wherever she sees fit by claiming that such a rule would have the "desirable" effect of holding the defendant to the highest possible standard of accountability [Resp. Br. 7, 23]. There are at least three answers to this contention, each sufficient.[9]

First: It is for Scotland to determine the standards that should govern liability to Scots arising out of an accident occurring in Scotland.

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[9] This Court already has indicated its lack of sympathy for respondent's related claim that a plaintiff somehow is entitled to the most favorable odds for the highest monetary judgment [Resp. Br. 25]. See *Gilbert*, 330 U.S. at 510. So, too, it has recorded serious doubts about the chauvinistic view that our own laws are always superior to those of other nations and must therefore always be applied. See, *e.g.*, *The Breman* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

Second: If, as respondent charges, petitioners have not followed "competent and careful manufacturing practices" [Resp. Br. 24], then they will be liable under Scots law of negligence and will be held accountable in a Scottish court.[10]

Third: As we have shown [Hz. Br. 37-42], the Court of Appeals plucked out of thin air the concept that Pennsylvania and Ohio have adopted the principle of strict liability in order to discipline their local producers into safe manufacture [A 147-49]. Respondent adopts the same unsubstantiated premise. In fact, the courts of those states consider that the doctrine of strict liability was adopted in order to compensate the injured consumer who lives or is injured in the state [Hz. Br. 38-42]. But even if we were to assume that the prospect of strict liability induces greater manufacturing care, ample incentive for United States manufacturers to conform to the highest standard is provided by the fact that they will be open to strict liability in cases arising out of accidents occurring in this country. There is neither a shred of evidence in the record nor indeed any reason to believe the allegations of *amicus curiae* that American aircraft manufacturers produce substandard goods for foreign distribution.[11] Indeed, an aircraft manufacturer does not know where its products eventually will be used, and may expect them to fly over numerous jurisdictions (many of which adhere to strict liability). Such a manufacturer would have no reason for or way of "designing and producing different [products] for its different geographical markets." [12]

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[10] See the affidavit of Ronald Ian Kerr MacLeod [A 18]: "Upon proof of negligence full damages will follow." See also, *e.g.*, H. Tebbens, *International Product Liability* 49-53 (1979).

[11] See Brief for Amicus Curiae Law Offices of Gerald C. Sterns 8, 15.

[12] *Michell* v. *General Motors Corp.*, 439 F. Supp. 24, 27 n.5 (N.D. Ohio 1977); see Hz. Br. 42.

4. Respondent's final point is that an especially strong showing is required in support of a *forum non conveniens* motion when suit has been brought on the defendant's "home turf" and where the defendant's economic capabilities are "disproportionately greater" than the plaintiff's [Resp. Br. 22-23]. We have no doubt that these are legitimate factors for a district court's consideration, along with all of the others enumerated in *Gilbert*, but we have no less doubt that these factors are not dispositive. They were not so treated in either of the cases cited by respondent,[13] or in any of the numerous cases in which *forum non conveniens* motions have been granted notwithstanding that the United States defendants (usually corporate) were sued on their "home turf."[14]

In any event, petitioner Hartzell has made whatever showing would be required to outweigh the fact of residence in the forum jurisdiction.[15] Respondent treats the issue as if "convenience" were a simple matter of how far the defendant has to walk to the courtroom, such that suit in the defendant's "home" jurisdiction almost by definition cannot be "inconvenient". But this is not what is at issue on a *forum non conveniens* motion. As

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[13] *Reavis* v. *Gulf Oil Corp.*, 85 F.R.D. 666 (D. Del. 1980); *Phoenix Canada Oil Co.* v. *Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978).

[14] *E.g.*, *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980); *Schertenleib* v. *Traum*, 589 F.2d 1156 (2d Cir. 1978); *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Grodinsky* v. *Fairchild Indus., Inc.*, 507 F. Supp. 1245 (D. Md. 1981); *Danser* v. *Firestone Tire & Rubber Co.*, 86 F.R.D. 120 (S.D.N.Y. 1980); *Abouchalache* v. *Hilton Int'l Co.*, 464 F. Supp. 94 (S.D.N.Y. 1978), *aff'd mem.*, 628 F.2d 1344 (2d Cir. 1980); *DeSairigne* v. *Gould*, 83 F. Supp. 270 (S.D.N.Y.), *aff'd*, 177 F.2d 515 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950).

[15] In fact Hartzell, as opposed to Piper, neither is incorporated nor has its principal place of business in Pennsylvania.

we have shown (*supra* pp. 5-6), this is a Scottish case, brought by Scots because of a Scottish accident. Petitioners here will be severely prejudiced by their inability to join the owner, operator, or pilot of the aircraft in any suit brought in a United States court, or to have compulsory process in respect of Scottish evidence, in a case in which there are serious allegations and evidence of faulty maintenance and pilot error [A 97, 100-102, 108-112, 115-116]. See *Alwataary General Trading & Agricultural Development Co.* v. *M.V. Sounion*, No. 80 Civ. 5374 (S.D.N.Y. June 12, 1981). We find no element of fairness in a tactic, now endorsed by the court below, that subjects petitioners to the risk that a jury will find them liable while leaving outside the courtroom and beyond the jury's view all of the defendants more immediately involved in the accident and all of the United Kingdom witnesses and evidence. It is in this sense that the concept of "convenience" must be evaluated; and it is evident that the mere fact that one of the two United States defendants is located in Pennsylvania pales in comparison to the factors favoring trial in Scotland.

IV

THE COURTS OF THE UNITED KINGDOM CONSTITUTE AN APPROPRIATE ALTERNATIVE FORUM FOR THIS LITIGATION

It has been a well-settled proposition, at least since *Gilbert*, that "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process . . . ." *Gilbert*, 330 U.S. at 506-07 (quoted in Resp. Br. 26; Hz. Br. 23). *Gilbert* says no more, however, than that there must be an alternative forum "in which the defendant is amenable to process"; there is no doubt that such is the case here.[16] Respondent (or the

[16] *Amicus* Sterns has suggested, Brief at 16-18, that Scotland may not be a "viable alternative forum" because of an unsupported

estates she represents) *is* "assured of [a] day in court" [Resp. Br. 26].

Respondent would translate *Gilbert's* requirement into one of "an adequate remedy and law," measured by a comparative inquest into the rights, remedies, and pro-

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allegation that "the availability of Scotland as an alternative forum is dependent on some future act of acquiescence . . . by defendants." From this unsupported premise *amicus* Sterns reasons to the conclusion, drawn by analogy from 28 U.S.C. § 1404(a) (1976) and this Court's construction of that statute in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), that an alternative forum does not exist because jurisdiction over petitioners in Scotland exists only by their consent. Our answer is two-fold:

As a matter of fact, there is absolutely nothing in the record in this case indicating that the Scottish courts would not assume jurisdiction over petitioners. Petitioners' agreement to accept service of process in Scotland [A 9, 17] obviated the need for any further inquiry into the matter. Consent is a sufficient basis for the exercise of a Scottish court's jurisdiction (see Dodson, "United Kingdom," in *Product Liability: A Manual of Practice in Selected Nations* 66 (1981)). Respondent herself has made no suggestion that the Scottish courts would lack jurisdiction over petitioners.

As a matter of law, *amicus'* reasoning from *Hoffman* v. *Blaski* is untenable. The rationale of that decision is limited to construction of the statutory language "where [the action] might have been brought", and does not conform to the common law rule. Justice Frankfurter so demonstrated in dissent. 363 U.S. at 364-65. As the Second Circuit has explained in *Schertenleib* v. *Traum*, 589 F.2d 1156, 1163 (2d Cir. 1978),

> "When the alternative forum is foreign, . . . our courts have difficulty discerning whether a nonresident defendant really would be subject to jurisdiction in the foreign country without his consent. Indeed, the court may receive conflicting expert opinions on this issue. If the defendant consents to suit in the foreign alternate forum, and if that appears to be sufficient under the foreign law, why waste the litigants' money and the court's time in what is essentially an unnecessary and difficult inquiry into the further intricacies of foreign jurisdictional law?"

Accord, *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1029 n.1 (3d Cir. 1980); *Grodinsky* v. *Fairchild Indus., Inc.*, 507 F. Supp. 1245, 1250 n.3 (D. Md. 1981).

cedures offered in the alternative forum [Resp. Br. 8].[17] This was not the approach followed by this Court in *Canada Malting*, where no judgment was rendered on the content of foreign law or inquiry made into the procedures that would be followed in the foreign court. But even if a gloss were to be placed on the requirement of an alternative forum, so that in some case an alternative forum might be found so deficient in law or procedure as to preclude dismissal, this is not such a case. Scots law and the Scottish courts (with which our own law and courts share a heritage and a fundamentally similar jurisprudence) are plainly "adequate" in even the most expansive sense of that word.

Respondent's sole allegation of inadequacy of the Scottish forum is that there she will be "[u]nable to prosecute causes of action for wrongful death and strict products liability, and [will be] limited solely to proving negligence" [Resp. Br. 32-33].[18] In the first place, under

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[17] Respondent herself at one point frames the requirement of "an adequate remedy and law" as being satisfied if dismissal "will not *completely* deprive [plaintiff] of the rights and advantages he sought" [Resp. Br. 27 (emphasis added)]. The notion that the alternative forum must provide the full compass of relief available in federal court, see, *e.g.*, *id.* 28, simply is without basis, and is flatly inconsistent with this Court's decision in *Canada Malting*, where relegation of the plaintiff to a Canadian court most likely deprived it of half of its potential recovery. 285 U.S. at 418; see Hz. Br. 19 & n.28.

[18] Respondent also claims [Resp. Br. 29 n.20] that Scottish discovery procedures are less satisfactory than those available in the federal courts. We doubt that judicial notice can extend to a telephone conversation of counsel held two years before. Even if it does, we find in the contents of that communication no basic difference from American procedures. In any event, the alleged differences hardly amount to the kind of procedural limitations that would lead to a conclusion that the alternative forum was inadequate. See, *e.g.*, *Dahl* v. *United Technologies Corp.*, 472 F. Supp. 696, 699 (D. Del. 1979), *aff'd*, 632 F.2d 1027 (3d Cir. 1980); *Calavo Growers of California* v. *Generali Belgium*, 632 F.2d

Scots law a decedent's beneficiaries may bring an action for wrongful death [A 18-19]. This is not substantially different from the rule in most jurisdictions in the United States (including Ohio and Pennsylvania), where the action may be brought either by the personal representative or by certain beneficiaries designated by statute,[19] but in either case is brought on behalf of the statutory beneficiaries.[20] The Scots action for wrongful death is governed by the Damages (Scotland) Act 1976

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963 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 871 (1981); *Grodinsky* v. *Fairchild Indus., Inc.*, 507 F. Supp. 1245, 1250-51 (D. Md. 1981); *Danser* v. *Firestone Tire & Rubber Co.*, 86 F.R.D. 120, 122 (S.D.N.Y. 1980).

[19] The first such statute was England's Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), which "become the prototype of American wrongful-death statutes . . . ." *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 581 (1974).

[20] Prosser, *Law of Torts* § 127, at 903-904 (4th ed. 1971). The Ohio statute provides that "[a]n action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent." Ohio Rev. Code Ann. § 2125.02 (1976) (Page). The Pennsylvania statute in effect at the time this suit was filed provided for suit by the widow of a decedent, "or if there be no widow, [by] the personal representatives", Pa. Stat. Ann. tit. 12, § 1601 (Purdon), but provided further that the persons entitled to recover damages "shall be the husband, widow, children, or parents of the deceased, and no other relatives". *Id.* § 1602. (These sections have since been repealed and recodified, effective June 27, 1978, as 42 Pa. Cons. Stat. Ann. § 8301 (Purdon).)

The Scottish statute provides that the personal representative may sue only "in respect of patrimonial losses suffered by the estate," but that damages for wrongful death may be sought by the spouse, parent, child, ascendants and descendants (other than parents and children), brothers, sisters, nieces, nephews, uncles and aunts (and their issue), any person accepted by the deceased as a child of his family, and a divorced spouse of the deceased—with the above relationships including relationships of the halfblood, illegitimate children, and stepchildren. Damages (Scotland) Act 1976 §§ 1, 4, 10 (and Schedule 1); see A 18-19.

[A 18], which may be more generous to the relatives of the decedent in terms of permissible damages than are the laws of either Pennsylvania or Ohio.[21]

As for strict liability and negligence, it is far from clear to us that characterizing them as distinct causes of action is of great significance for purposes of deciding a *forum non conveniens* motion.[22] In any event,

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[21] The Damages (Scotland) Act 1976 allows members of the deceased's "immediate family" (defined as the deceased's spouse, parents, children, and persons accepted by the deceased as his children) to recover damages for both loss of support and loss of society [A 19], the latter comprising "compensation for the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died". Damages (Scotland) Act 1976, § 1(4). See The Law Commission and the Scottish Law Commission, *Liability for Defective Products* 6 (1975) (where death results, a dependent's claim under English law is for pecuniary loss only, "whereas under Scots law there may also be a claim for non-pecuniary loss (*solatium*)"). The latter class of damages, which often may be more substantial than damages for loss of support, see *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 605-609 (1974) (POWELL, J., dissenting), are explicitly prohibited by statute in Ohio, which limits damages to those for "pecuniary injury". Ohio Rev. Code Ann. § 2125.02 (1976) (Page); see *Keaton* v. *Ribbeck*, 58 Ohio St. 2d 443, 391 N.E.2d 307 (1979); *Rubeck* v. *Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978); *Karr* v. *Sixt*, 146 Ohio St. 2d 527, 67 N.E.2d 331 (1946); *Kennedy* v. *Byers*, 107 Ohio St. 90, 140 N.E. 630 (1923). In Pennsylvania the limitation of damages to compensation for "pecuniary loss" has been imposed by the courts, see *Ferne* v. *Chadderton*, 363 Pa. 191, 69 A.2d 104 (1949), which, with the exception of one aberrational decision (*Spangler* v. *Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 153 A.2d 490 (1959)), have not allowed damages for loss of society. See, *e.g.*, *Haddigan* v. *Harkins*, 441 F.2d 844, 852 (3d Cir. 1970); *Soares* v. *McClosky*, 466 F. Supp. 703, 708 (E.D. Pa. 1979); *Prince* v. *Adams*, 229 Pa. Super. 150, 324 A.2d 358 (1974).

[22] After all, a " 'cause of action' may mean one thing for one purpose and something different for another." *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933) (Cardozo, J.), *quoted in Davis* v. *Passman*, 442 U.S. 228, 237 (1979).

there may be little practical difference between them, in an action against a manufacturer involving allegations of a manufacturing defect, as far as the outcome of the case is concerned. The Scottish Law Commission, which recently convened to consider changes in Scots law on product liability, has suggested that "[i]t may be that proof of a manufacturing defect is nowadays so likely to lead to a finding that the manufacturer . . . failed to take reasonable care, that the duty on the manufacturer is as near to being strict as makes no difference." [23]

In short, respondent's claims of prejudice in prosecuting these claims in Scotland are gossamer-thin. But whether they are or not, a federal court deciding a *forum non conveniens* motion is not obliged to parse the intricacies of foreign law, comparing them in every particular with its own law. It is evident in this case that the differences between local and Scots law in their salient respects fall far short of the differences that this Court was willing to abide in *Canada Malting*. They are less consequential than the differences that have not concerned the lower courts whose decisions countenancing dismissals that would prejudice plaintiffs are cited in our principal brief [Hz. Br. 33-34].[24] There is no risk

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[23] The Law Commission and the Scottish Law Commission, *supra* note 21, at 34-35. Dean Prosser expressed the same skepticism about the practical differences between strict liability and negligence, in actions against manufacturers as opposed to intermediate sellers, when strict liability first began to gain acceptance in this country. In a seminal article, he wrote: "Where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1114 (1960); see *id.* 1116-17.

[24] And Scots law on these issues seems to compare favorably with what we know from the reported opinions about Norwegian law,

that the relatives of the decedents represented by respondent will be deprived of a remedy or treated unfairly in any way. Their claims will be adjudicated according to the law of their own country, whose courts are available, adequate, and appropriate for this litigation.

CONCLUSION

For the foregoing reasons and those stated in our principal brief, the judgment of the Court of Appeals should be reversed, with directions to affirm the judgment of the District Court dismissing this action on the ground of *forum non conveniens.*

Respectfully submitted,

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see *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980), which respondent seems to think affords a remedy "almost identical" to that afforded in the United States [Resp. Br. 31].

MOTION FILED
MAY - 9 1981

Office-Supreme Court, U.S.
FILED
1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-848; 80-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARTZELL PROPELLER, INC.,
and
PIPER AIRCRAFT COMPANY,
Petitioners,

v.

GAYNELL REYNO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

BRIEF FOR THE BOEING COMPANY, LOCKHEED CORPORATION, McDONNELL DOUGLAS CORPORATION, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Nos. 80-848; 80-883

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The Boeing Company, Lockheed Corporation, and McDonnell Douglas Corporation hereby respectfully move for leave to file the attached brief as amici curiae in this case. The consent of the attorney for the respondent and of the attorneys for the petitioners was requested but refused.

The interest of The Boeing Company, Lockheed Corporation, and McDonnell Douglas Corporation in this case arises from their business as manufacturers of commercial jet aircraft which are used worldwide. From time to time, these aircraft are involved in accidents in countries other than the United States. In the past decade, Boeing, Lockheed, and McDonnell Douglas have been subject to an increasing number of lawsuits

brought in the United States arising out of foreign aircraft accidents. Because much of the evidence is located abroad, the operator and other key actors are not parties to the American suit, and the attendance at trial of key foreign witnesses cannot be compelled, these cases are extremely difficult for the manufacturer to defend.

The doctrine of forum non conveniens has provided manufacturers with an important procedural safeguard against litigation which can more fairly be tried in foreign courts. However, in the instant case, the Court of Appeals concluded that a federal court could not dismiss any action on the basis of forum non conveniens where the dismissal would result in a change in the applicable law. *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149, 164 (3d Cir. 1980). This decision, if affirmed, will emasculate the doctrine of forum non conveniens since plaintiffs rarely choose to bring suits in a forum which will apply a less favorable law than another, more convenient forum.

The brief which amici curiae are requesting permission to file addresses important issues not heretofore considered by this Court concerning the relationship between the principles set forth in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), and the doctrine of forum non conveniens. If the argument of amici curiae is accepted, it would be dispositive of this case.

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BRIEF FOR THE BOEING COMPANY, LOCKHEED CORPORATION, McDONNELL DOUGLAS CORPORATION, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

This matter presents important issues not previously addressed by this Court concerning the relationship between the

principles set forth in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), and the doctrine of forum non conveniens. Respondent is the personal representative of five Scottish citizens killed in an aircraft accident which occurred on a domestic Scottish flight. Petitioners are the American manufacturer of the aircraft and the American manufacturer of one of its components. The principal issue presented is the following:

Does this Court's decision in *Van Dusen* prevent a federal court from dismissing an action on forum non conveniens grounds whenever the American court would apply a law more favorable to the plaintiff than the law which would be applied in the jurisdiction where the matter could more conveniently be heard?

INTEREST OF AMICI CURIAE

Amici curiae are manufacturers of commercial jet aircraft which are used world-wide. From time to time these aircraft are involved in accidents in countries other than the United States. In the past decade, amici curiae have been subjected to an increasing number of lawsuits brought in the United States arising out of foreign aircraft accidents. These actions have been brought by claimants who have sought out or been sought out by American lawyers and have come to the United States seeking the more favorable law and more generous awards available here.

In addition to the burden placed on the American court system by having these large and complex cases tried here, these cases are frequently extremely difficult for an American manufacturer to defend. Much of the critical evidence as to liability and all of the evidence as to damages is located in a foreign country and is available to the American manufacturer either not at all or only after a cumbersome international discovery process which often requires diplomatic intervention. Attendance at trial of key foreign witnesses cannot be compelled. In contrast, the American manufacturers, when they have had actions moved to the convenient foreign forums, have generally agreed to make their witnesses and documents available in the foreign court.

Although these actions frequently are cast solely as product liability suits against the manufacturer, such casting is misleading. The airline or others involved in the maintenance, operation and control of the aircraft are not parties to the American suit may be due to any of several reasons: they may not be subject to jurisdiction in the United States; they may have limited liability by virtue of a treaty or internal statute or regulation of the foreign country; or, as in this case, an action against the operator may actually be pending in the foreign courts. Moreover, American products liability law is such that the plaintiff may prevail against the manufacturer without showing that the conduct of the manufacturer was a major contributing cause of the accident. Joint and several liability and expanded concepts of product liability for design defects, failure to warn, and failure to have warning or other safety devices can create a major exposure for the manufacturer for what is essentially an operational accident.[1] If these essentially "foreign" cases remain in the United States, the manufacturer is placed in the difficult position of having to defend its product in a suit to which the other key actors are not parties and the focus is unfairly placed upon the product. All of these problems can be avoided by trial in the foreign forum where the participation of all interested parties can easily be obtained. Thus, the courts have properly responded to the recent spate of imported litigation with a number of decisions dismissing these actions on the basis of forum non conveniens.[2]

Amici curiae have requested permission to submit this brief because they believe that the decision of the Court of Appeals,

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[1] *See, e.g., Chart* v. *General Motors Corp.*, 80 Wis.2d 91, 258 N.W.2d 680 (1977) (automobile manufacturer only 12 percent at fault required to pay entire judgment because operator of vehicle was insolvent); *Sun Valley Airlines* v. *Avco Lycoming Corp.*, 411 F.Supp. 598 (D. Idaho 1976) (operator 90 per cent at fault; manufacturer 10 per cent at fault).

[2] *See, e.g., Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980); *Fosen* v. *United Technologies Corp.*, 633 F.2d 203 (2d Cir. 1980); *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980); *Macedo* v. *Boeing Co.*, Civ. Nos. 79-C-2488, 4771, and 4772 (N.D. Ill. Jan. 11, 1980), *appeal docketed*, No. 80-1559 (7th Cir. April 25, 1980); *Orr* v. *Boeing Co.*, CV-79-526 (C.D. Cal. April 23, 1979), *appeal docketed*, No. 79-3404 (9th Cir. July 19, 1979). *See also Bouvy-Loggers* v. *Pan American World Airways, Inc.*, 15 Av. Cas. 17,153 (S.D.N.Y. 1978).

if affirmed, will emasculate the doctrine of forum non conveniens and deprive manufacturers of an important procedural protection. The Court of Appeals concluded that a federal court could not dismiss any action on the basis of forum non conveniens where the dismissal would result in a change in the applicable law. 630 F.2d at 164. Since plaintiffs rarely choose to bring suits in a forum which will apply a less favorable law than another more convenient forum, the doctrine of forum non conveniens could rarely be invoked. Amici curiae believe that the rule enunciated by the Court of Appeals is not correct and should not be followed.

STATEMENT OF THE CASE

Amici curiae will not attempt to set forth herein a detailed statement of the facts and procedural history. These were described in detail in the petitions and will, no doubt, be adequately described in the briefs of the parties. The prior proceedings and the decisions below will, therefore, be discussed summarily.

I.

COMMENCEMENT OF THE ACTION AND TRANSFER

This action was originally commenced against defendants Piper Aircraft Company ("Piper") and Hartzell Propeller, Inc. ("Hartzell") in California state court by a person who was appointed personal representative of the decedents in California but who had no preexisting relationship with the decedents. The action was removed to the United States District Court for the Central District of California and defendants then moved to transfer the action to a federal court in Pennsylvania. The bases for the motions were that jurisdiction over Hartzell was lacking in California and that the convenience of parties and witnesses and the interests of justice favored trial in Pennsylvania rather than California which had no relationship to the transaction or the parties. The California federal court agreed with defendants and ruled that the actions should be transferred pursuant to 28 U.S.C. § 1404(a) to the Middle District of Pennsylvania.

II.

THE DISTRICT COURT'S DISMISSAL

After transfer, defendants moved, *inter alia*, to dismiss the action on the basis of forum non conveniens. The district court granted the motions and dismissed the action on the condition that defendants submit to jursidiction in Scotland and waive any defense based on the statute of limitations. *Reyno* v. *Piper Aircraft Co.*, 479 F. Supp. 727 (M.D. Pa. 1979).

In so ruling, the court analyzed the action in terms of the public and private interest factors set forth by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and found that they "overwhelmingly point to dismissal." 479 F. Supp. at 731. Among those private interest factors that the court considered most significant were that "nearly all witnesses needed for the defense of this suit are located in the British Isles" (*id.* at 732), that "all evidence as to damages, both witnesses and documents, is located in Scotland" (*id.*), that "the only connection with [Pennsylvania] is the fact that the plane was manufactured [t]here over seven years before the accident" (*id.*), that "[t]he only contact with ... California is that Plaintiff's attorney and expert reside there" (*id.*), "[t]he unavailability of compulsory process to compel the attendance of witnesses necessary for complete and fair trial" (*id.* at 733), "[the] inability to implead parties located in" Scotland (*id.*), and that "[f]amiliarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by trial in the British Isles" (*id.* at 734).

The district court found that the public interest factors "even more strongly point to dismissal." *Id.* As recited by the district court, "[t]hese factors include court congestion, local interest in the lawsuit, court familiarity with the law that will govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the court and the unfairness of burdening citizens in an unrelated forum with jury duty." *Id.* With respect to choice of law, the court noted that a trial in Pennsylvania "would be hopelessly complex and confusing for a jury as different laws will apply to different parties." *Id.* The

court found that under California conflict of laws applicable to the claim against Piper, Scottish law applied as to who could bring an action for wrongful death and Pennsylvania law applied with respect to the availability of an action based on strict liability in tort. *Id.* at 736. With respect to the claim against Hartzell, the court concluded that Scottish law applied to all issues. *Id.* at 737. Thus, having determined that Scottish law would govern part of the action, the court concluded that "it would be better for all parties for this case to proceed in a court in Scotland that is at home with the law of that country." *Id.*

The district court also addressed, and rejected, plaintiff's contention that the action should not be dismissed because the law of Scotland was not as favorable to her:

> That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum.

Id. at 738.

III.

THE COURT OF APPEALS' REVERSAL

The Court of Appeals reversed. *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980). While the Court of Appeals disagreed with the district court on several points, the most significant difference, and the principal reason for the reversal, was with respect to the governing law. As noted, the district court had concluded that because Scottish law would apply to

at least some issues were the action to remain in Pennsylvania, and because there were difficulties associated with the application of different laws to the claims against the different defendants, the public interest favored dismissal of the action. The Court of Appeals, while apparently not disagreeing with the district court that Scottish law might apply to some issues,[3] concluded, contrary to the district court's analysis, that the strict liability law of Ohio would apply to the claim against Hartzell. 630 F.2d at 169-171 and especially n. 95. The court further concluded that because a Scottish court would not apply American strict liability law, dismissal on the basis of forum non conveniens was inappropriate: "[A] dismissal for forum non conveniens, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law.'" *Id.* at 164.

SUMMARY OF ARGUMENT

In *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), this Court held that the decision to grant or deny a motion to dismiss an action on the ground of forum non conveniens is entrusted to the sound discretion of the trial judge, who must consider a number of factors, no one of which is necessarily

[3] The Court of Appeals' opinion is difficult to follow on this point. While the court states that "the negligence and damage limitations law of Scotland" would not apply (630 F.2d at 171), and that "the district court erred in concluding that foreign law would govern a substantial part of the case" (*id.*), it leaves open the issue of whether plaintiff had "representative capacity" without expressly disputing the district court's conclusion that this issue should be resolved by reference to Scottish law. Furthermore, while the Court of Appeals speaks of "damage limitations," there is no indication in the record that Scotland has any damage limitations as such. While the elements of recovery or the class of persons entitled to benefit from the award may be more restricted in Scotland, a long line of decisions has found that the law of the decedents' and beneficiaries' domicile has the greatest interest in these matters. *See, e.g., Junco* v. *Eastern Air Lines, Inc.*, 399 F.Supp. 666 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 310 (2d Cir. 1976); *Gordon* v. *Eastern Air Lines, Inc.*, 391 F. Supp. 31 (S.D.N.Y. 1975); *Bouvy-Loggers* v. *Pan American World Airways, Inc.*, 15 Av. Cas. 17,153 (S.D.N.Y. 1978); *Griffith* v. *United Air Lines*, 416 Pa.1, 203 A.2d 796 (1964). *Cf. In re Air Crash Disaster near Chicago, Illinois, on May 25, 1979*, 500 F. Supp. 1044, 1047-1048 (N.D. Ill. 1980), *rev'd on other grounds*, 16 Av. Cas. 17,122 (7th Cir. Jan. 5, 1981) ("[C]ompensatory damages probably are to be governed by the law of the domicile of the plaintiffs or their decedents.")

determinative. Previously, in *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), this Court had held that a dismissal on the basis of forum non conveniens may be entered even though the more convenient alternative forum will apply a law less favorable to the plaintiff. In spite of these precedents, the Court of Appeals in this case held that this Court's decision in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), precludes a federal district court from dismissing an action on the basis of forum non conveniens whenever the more convenient forum will apply a law less favorable to the plaintiff. By so ruling, the Court of Appeals created an exception to the forum non conveniens doctrine so large that the doctrine itself is swallowed. Thus, at issue in this case is the continued existence in the federal courts of the doctrine of forum non conveniens.

That the Court of Appeals' decision will encourage forum shopping for a favorable law is apparent. Furthermore, the decision is based on a misunderstanding of the principles involved in *Van Dusen*. In *Van Dusen*, this Court held that in a diversity action transferred from one federal district court to another under 28 U.S.C. § 1404(a), the substantive law of the transferor state should continue to apply. This holding was based on the *Erie* doctrine and was intended to assure that the "accident of federal diversity jurisdiction" did not result in the application of a different law than would have been applied by the state courts in the place where the action was filed. The Court of Appeals in this case turned *Van Dusen* on its head and established a rule that will not only leave litigation in inconvenient forums and promote rather than deter forum shopping, but will cause a *different* result to be reached in federal court than would have been reached in state court.

Because the decision of the Court of Appeals lacks any sound precedential or policy basis, it is incorrect and should be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED IN GIVING DECISIVE WEIGHT TO ITS ASSUMPTION THAT A SCOTTISH COURT WOULD APPLY A LAW LESS FAVORABLE TO PLAINTIFF THAN THE LAW WHICH WOULD BE APPLIED BY AN AMERICAN COURT

The paramount reason for the Court of Appeals' reversal of the district court's dismissal of the action was that

> the dismissal would work a change in the applicable law so that plaintiff's strict liability claim would be eliminated from the case. . . . [A] dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

630 F.2d at 163-164 (footnote omitted). This conclusion was based on the same court's prior opinion in *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), which, in turn, was purportedly based on this Court's decision in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964).

Amici curiae believe that both *DeMateos* and the decision of the Court of Appeals in this case reflect a fundamental misunderstanding of this Court's holding in *Van Dusen* and the policy reasons for that holding. *Van Dusen*, like the present case, arose out of an aircraft accident. However, in *Van Dusen, unlike* the present case, the action was originally brought in the plaintiffs' and decedents' home state, which was also the destination of the flight. There was no element of forum shopping involved and no suggestion that the actions met the test for a forum non conveniens dismissal. Rather, the actions were transferred from one appropriate forum (Pennsylvania) to another appropriate and more convenient forum (Massachusetts). As this Court noted in *Van Dusen*, "the most convenient forum is frequently the place where the cause of action arose."

376 U.S. at 628. The transfers did not involve a forum non conveniens dismissal but rather were made pursuant to a federal statute (28 U.S.C. § 1404(a)) which had previously been construed by this Court "to permit courts to grant transfers upon a lesser showing of inconvenience." *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955).

In *Van Dusen*, this Court held that on the facts before it the transferee court must apply the same law as the transferor court would have applied, including its choice of law rules. 376 U.S. at 639. This result was required by the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). As this Court stated:

> We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.
>
> Although we deal here with a congressional statute apportioning the business of the federal courts, our interpretation of that statute fully accords with and is supported by the policy underlying *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.... As this Court said in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109:
>
> > "*Erie R. Co.* v. *Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts.... The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away should not lead to a substantially different result."
>
> Applying this analysis to § 1404(a), *we should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.* This purpose would be defeated in cases such as the present if nonresi-

> dent defendants, properly subjected to suit in the transferor State (Pennsylvania), could invoke § 1404(a) to gain the benefits of the laws of another jurisdiction (Massachusetts). What *Erie* and the cases following it have sought was identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.

376 U.S. at 636-639 (footnotes omitted; emphasis added).

The *Van Dusen* actions would not have been dismissed on forum non conveniens grounds by a Pennsylvania state court, and the plaintiffs in those actions would have been entitled to have their claims decided by a Pennsylvania state court under Pennsylvania law, including its conflict of laws rules. Thus, *Erie* and its progeny required that the federal courts also apply Pennsylvania law, including its conflict of laws rules, to the actions properly filed in Pennsylvania federal court but transferred pursuant to "a federal statute apportioning the business of the federal courts."

The present case is not the same as *Van Dusen*, however, and to the extent that the *Erie* doctrine is relevant to this case, it supports a result exactly opposite to that reached by the Court of Appeals here. This suit was brought in California, a jurisdiction whose only contact with any of the parties or the transaction at issue was the fact that one of the defendants was apparently subject to suit there. Thus, California was plainly an inconvenient forum and, had the action remained in the California state courts, a dismissal on the grounds of forum non conveniens would have been a certainty. *See, e.g., Hemmelgarn* v. *Boeing Co.*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980); *Gould, Inc.* v. *Health Science, Inc.*, 54 Cal. App. 3d 687, 126 Cal. Rptr. 726 (1976); *Great Northern Ry. Co.* v. *Superior Court*, 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970). Moreover, the fact of critical significance to the Court of Appeals—that the foreign court would not apply a law as

favorable to plaintiff as that which the California courts would apply—would not have prevented the California courts from dismissing this action on forum non conveniens grounds. In *Hemmelgarn,* which like the present case involved an action on behalf of foreign nationals arising out of a foreign aircraft accident, the court assumed that a change in the applicable law might result from the dismissal but dismissed the action nonetheless:

> The difficulty with the present case is that it is not possible to satisfy all of California's policy considerations by retaining the case here and it is equally impossible to satisfy all those policy considerations by requiring trial in Canada. In either situation some policy trade-offs are necessary which the court must consider in the exercise of its discretion.
>
> Here, accepting plaintiffs' premise on damages as true, . . . and although defendants Rohr and Boeing may not feel the full sting of damages as computed in accordance with California law, they nevertheless will feel some sting from the damages imposed by the Canadian court.

165 Cal. Rptr. at 197.[4]

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[4] *See also Archibald* v. *Cinerama Hotels,* 15 Cal. 3d 853, 544 P.2d 947, 126 Cal. Rptr. 811 (1976). *Archibald* was a class action against a number of Hawaii hotels. The trial court dismissed the action on the ground of forum non conveniens. On appeal plaintiff contended that forum non conveniens was inapplicable because there was no suitable alternative forum. The basis for this contention was that Hawaii class action procedures were less favorable to plaintiff than those of California. The California Supreme Court rejected this contention, stating:

> We do, however, address one argument presented by plaintiff since its determination would preclude the exercise of *any* discretion by the trial court in the matter.
>
> Plaintiff argues that defendants have failed to show the existence of a suitable alternative forum (see *Gulf Oil Co.* v. *Gilbert, supra,* 330 U.S. 501, 506-507, 67 S.Ct. 839, 91 L.Ed. 1055), and consequently that the trial court lacks the discretion to stay proceedings in California.
>
> Plaintiff's argument rests on a comparison of class action procedures in California and Hawaii.
>
> • • •
>
> Any attempt on our part to predict how Hawaiian courts will resolve unsettled issues of class action procedure would be purely speculative. But, *contrary to plaintiff's contention, the existence of unsettled questions of Hawaiian procedure does not compel the trial court to conclude as a matter of law that Hawaii is not a suitable alternative forum.*

15 Cal. 3d at 861-862 (footnote omitted; emphasis added).

This review of California law demonstrates that the rule adopted by the Third Circuit in this case frustrates rather than furthers the *Erie* principles which underly *Van Dusen*. Unlike *Van Dusen*, where the effect of continued application of the law of the transferor forum was that the same law would be applied by the state and federal forums, in the present case the effect of a refusal to dismiss the action on the ground of forum non conveniens is not only to leave the action in an inconvenient forum but to achieve an entirely different result in the federal court than would have been reached in the state court. This action would have been dismissed by the California state courts on the ground of forum non conveniens and plaintiff would have lost any opportunity to have California choice of law rules apply.[5] *Van Dusen* does not require the federal courts to reach a different result. Indeed, the tenor of *Van Dusen* is precisely the opposite.

One point should be emphasized. Amici curiae do not contend that forum non conveniens dismissals in diversity cases must be resolved by reference to state law. This issue was left

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[5] This fact also casts doubt upon the conclusion of both lower courts that as to the claim against Piper California law would necessarily apply after a § 1404(a) transfer. If the California state courts would have dismissed this action on forum non conveniens grounds—thereby defeating plaintiff's attempt to invoke California law—*Van Dusen* does not require a different result in federal court. This point was expressly recognized by this Court in *Van Dusen*:

> . . . [W]e do not and need not consider whether in all cases § 1404 (a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if . . . it was contended that the transferor State would simply have dismissed the action on the ground of forum non conveniens.

376 U.S. at 639-640 (footnotes omitted).

The Court of Appeals cited one case, *In re Air Crash Disaster at Boston, Mass*, 399 F. Supp. 1106, 1121-1122 (D. Mass. 1975), in support of its position that California law still applied. In *Boston*, the court concluded that it would be inappropriate to apply the law of the transferee forum because:

> An assumption that a plaintiff, after dismissal, would choose to bring his action in the transferree forum is plainly unjustified in any case in which another more favorable forum is open to him.

Id. at 1121.

This logic is questionable. There is no reason to give a forum shopping plaintiff the benefit of the doubt that he or she could shop for and find a forum less inconvenient than the original choice but with a choice of law rule more favorable than the rule followed in the convenient forum to which the action was transferred.

open by this Court in *Gulf Oil* and *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), and the lower federal courts have tended to consider the propriety of such dismissals a matter of federal law. *See e.g., Thomson* v. *Palmieri*, 355 F.2d 64, 66 (2d Cir. 1966); *Szantay* v. *Beech Aircraft Corp.*, 349 F.2d 60, 65 (4th Cir. 1965); *Grodinsky* v. *Fairchild Industries, Inc.*, Civ. No. M-80-722 (D.Md. Feb. 3, 1981); *Poe* v. *Marquette Cement Mfg. Co.*, 376 F. Supp. 1054 (D.Md. 1974); *Lapides* v. *Doner*, 248 F. Supp. 883 (E.D.Mich. 1965); *Ciprari* v. *Servicos Aereos Cruzeiro do Sul*, S.A., 232 F. Supp. 433, 442 (S.D.N.Y. 1964). Thus, the absence of a state law doctrine of forum non conveniens would not preclude a federal court from dismissing a diversity action on this basis since many of the factors involved in the decision whether to grant a forum non conveniens dismissal are matters of federal concern.[6] Similarly, it can at least be argued that a federal court need not dismiss on forum non conveniens grounds a diversity action which would have been dismissed in state court, at least to the extent that factors such as court congestion, not present in a particular federal court but present in state court, would have been a major reason for the latter's decision to dismiss the action, had it been brought there. *Cf. Parsons* v. *Chesapeake & O.R. Co.*, 375 U.S. 71, 73 (1963) (federal court need not transfer under 28 U.S.C. § 1404(a) an action based on federal law even though state court had dismissed identical action based on forum non conveniens; Court noted, "there is nothing to show that the problem in the federal court in Chicago [of "docket congestion"] is identical . . . to the problem in the Cook County court system").

In any event, complicated hypothetical conflicts between state and federal law need not be resolved here. In the present case all parties agreed, and the Court of Appeals found, that no difference exists among California, Pennsylvania and federal forum non conveniens principles, *see* 630 F.2d at 158. Thus the question of what law controls if there is a conflict can be resolved another day. Under the *Gulf Oil* factors used by all

[6] The converse situation, a state court dismissal of a federal claim by application of the state's standards for forum non conveniens dismissals, was approved in *Douglas* v. *New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929).

three jurisdictions, problems of foreign law and conflict of laws have been held to be relevant in two ways to the trial court's discretionary decision whether to dismiss a case on forum non conveniens grounds. *First*, there is a public interest "in having the trial . . . in a forum that is at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil*, 330 U.S. at 509. *Second*, the lower federal courts have not suggested that the new forum must afford precisely the same protection to a plaintiff as the inconvenient forum but have held only that the law and procedures which would be applied by the new forum must not be so devoid of due process that plaintiff would be deprived of "an adequate alternative forum." *See, e.g., Shields* v. *Mi Ryung Construction Co.*, Civ. No. 79-628 (S.D.N.Y. Feb. 21, 1981); *Alcoa S.S. Co., Inc.* v. *M/V Nordic Regent*, 636 F.2d 860, 871-872 (2d Cir. 1980) (en banc).

The public interest in avoiding problems associated with conflict of laws and application of foreign law strongly supports the dismissal of this action. The transaction giving rise to this litigation is centered in Scotland and, as apparently conceded by all parties and found by both courts, the Scottish courts would probably apply Scottish law. In contrast, this case presents to an American court "a classic example of the wilderness in which courts sometimes find themselves when searching for solutions to problems arising under the judicial nightmare known as Conflict of Laws." *Forsyth* v. *Cessna Aircraft Co.*, 520 F.2d 608, 609 (9th Cir. 1975).[7] Furthermore,

[7] It is difficult to imagine a case which better illustrates how "tangled" some problems in conflict of laws can be. The district court concluded that Pennsylvania choice of law doctrine required application of Scottish law to the issue of whether a cause of action in strict products liability existed. The Court of Appeals disagreed, holding that the Pennsylvania approach to conflict of laws was similar to the California "interest analysis" approach and that under "interest analysis" Ohio had an interest in applying strict liability to its resident manufacturer whereas Scotland had no interest in making it more difficult for its residents to recover by requiring that they prove negligence. Thus, there was a threshold dispute among the Pennsylvania judges who heard this case as to what is the current Pennsylvania approach to choice of law.

(footnotes continued on following page)

even if some American law would be applied by an American court to some issues, other issues related to the damages would still appear to be governed by Scottish law.[8]

This is also not a case where the law that would be applied by the foreign country is such that plaintiff would be deprived of an adequate alternative forum. Scotland is the home of the real parties in interest and the substantive law and procedural protections in Scotland are not at all dissimilar to our own. The critical difference perceived by the Court of Appeals between

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(footnotes continued from preceding page)

Furthermore, assuming the Court of Appeals was correct that "interest analysis" is the correct approach, the proper analysis of the various states' interests is itself far from clear. The Third Circuit concluded that application of the Ohio and Pennsylvania doctrines of strict tort liability for defective products would serve those states' "interest in the regulation of manufacturing." 630 F.2d at 168. However, exactly the opposite conclusion was reached by Judge Friendly in *George* v. *Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir.), *cert. denied*, 397 U.S. 904 (1964). He held that the interest of the state of manufacture was in having its products enter foreign states on the same terms as products manufactured elsewhere:

> [I]t would seem quite irrational that the victim's recovery on a theory of strict liability should depend upon whether or not the state where the plane was manufactured had chosen so to provide with respect to accidents as to which it had primary concern. Extra-state manufacturers are not entitled to have their goods enter a state on easier terms as to liability than the state establishes generally; they are as able as the intra-state manufacturer to provide for their own protection by insurance or self-insurance. *Even more clearly* if a state has decided in general that persons injured within its borders by a particular kind of defective chattel should not be allowed to recover against the manufacturer except for negligence, there would be little reason to accord a greater degree of protection because the chattel causing the injury was made in another state which has shown a broader concern for the general welfare of its citizens by imposing strict liability.

332 F.2d at 77 (emphasis added). At least one Pennsylvania judge has employed reasoning quite similar to Judge Friendly. *See Harrison* v. *Wyeth Laboratories*, No. 79-2788 (E.D. Pa. July 1, 1980).

Finally, since the Court of Appeals thought that Ohio had an interest in the application of its law to Hartzell, it is relevant how Ohio itself perceives its interest. *See* Restatement (Second) of Conflict of Laws § 8, Comment k. In *Michell* v. *General Motors Corp.*, 439 F. Supp. 24, 27-28 (N.D. Ohio 1977), an experienced Ohio judge concluded that Ohio had no interest in the application of its strict liability doctrine to a case involving a Canadian accident and Canadian plaintiffs.

[8] As the district court noted, "[w]e are relegated to this less than complete analysis [of the conflicts between Pennsylvania and Scottish law] because of our unfamiliarity with Scottish law which in itself is a factor supportive of dismissal of the action." 479 F. Supp. at 735.

trial in Pennsylvania and trial in Scotland is that while strict liability would be available in Pennsylvania, plaintiff must prove negligence in order to recover in Scotland. This is hardly the kind of difference which would deprive the plaintiff of a fair trial in Scotland.[9] Much more fundamental objections to the adequacy of the foreign forum were made in *Shields* and *Alcoa* and rejected.

There is no federal rule automatically precluding a forum non conveniens dismissal merely because the forum in which the action must be refiled would apply a different law to the plaintiff's claim. Indeed, this Court has expressly rejected such a rule. In *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), this Court affirmed a dismissal on forum non conveniens grounds of a suit in admiralty notwithstanding libellants' assertion that a Canadian court would, by application of a different choice of law rule, apply Canadian law which would not have created joint and several liability in favor of libellants. Libellants' assertion as to the content of Canadian choice of law doctrine was disputed, but this Court stated:

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[9] Significantly, the plaintiff's allegations here involve primarily defects in design and inadequate warnings. *See* 630 F.2d at 154 n.2. In a design defect or failure to warn case it is doubtful that there should be *any* difference between strict liability and negligence. Certainly there is no difference under Ohio law which the Court of Appeals held applicable to Hartzell. *See Temple* v. *Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267, 272-273 (1977):

> We have thus far discussed appellees' liability in terms of strict tort liability. It is, however, apparent that the rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of a product is a rule fixing a standard of care, and any tort resulting from the failure to meet this duty is, in essence, a negligent act.
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> * * *
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> To date, no Ohio case has specifically defined the duties of a manufacturer relative to product design, but the general rule is that " . . . [i]t is the duty of a manufacturer to use reasonable care under the circumstances to so design his product as to make it not accident or foolproof, but safe for the use for which it is intended." *Gosset* v. *Chrysler Corp.* (C.A.6, 1966), 359 F.2d 84, 87.
>
> The law in other jurisdictions is similar. *See e.g., Robinson* v. *Reed-Prentice Division of Package Machinery Co.*, 49 N.Y.2d 471, 479, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980). ("Since no product may be completely accident proof, the ultimate question in determining whether an article is defectively designed involves a balancing of the likelihood of harm against the burden of taking precaution against that harm.")

> We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy.

285 U.S. at 419-420. *Accord, Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Anglo-American Grain Co.* v. *The S/T Mina D'Amico*, 169 F. Supp. 908 (E.D. Va. 1959). As the Second Circuit held in *Fitzgerald*:

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover.

521 F.2d at 453 (citation omitted).

It is thus apparent that the position taken by the Court of Appeals in this case concerning the test for a forum non conveniens dismissal is not supported by *Gulf Oil*, is contrary to *Canada Malting*, and is at odds with, rather than compelled by, the federalism principles involved in *Van Dusen*. Indeed, the rule enunciated by the Third Circuit can only have the effect of encouraging the sort of forum shopping which occurred here. To encourage forum shopping by allowing plaintiff to pick his law at will and hold on to it forever is most definitely *not* the public policy this Court sought to promote in *Van Dusen*. Indeed, even before *Van Dusen* was decided, the proper scope of the *Van Dusen* principle was analyzed by the Second Circuit in *H.L. Green Co.* v. *MacMahon*, 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963). That decision is instructive.

H.L. Green was an action commenced in the Southern District of New York in which the plaintiff, a New York corporation, alleged violations of § 10(b) of the Securities Exchange Act and common law fraud. The defendant moved to have the action transferred to the Southern District of Alabama under § 1404(a) and the motion was granted. In its

petition to the Second Circuit for a writ of mandamus prohibiting the transfer, plaintiff asserted that the transfer would not be in the interests of justice, in part because its effect would be that Alabama law, which was less favorable than New York law, would be applied to the common law claim. Anticipating *Van Dusen*, the Court of Appeals for the Second Circuit refused to grant the writ noting that, because of *Erie*, New York law (including, as to the common law claim, its conflict of laws rules) should continue to apply. 312 F.2d at 652-653. However, this Court went to some length to emphasize that when federalism considerations were put aside a plaintiff does not have an unfettered right to shop for the most favorable law:

> A plaintiff may not resist the transfer of his action to another district court on the ground that the transferee court will or may interpret federal law in a manner less favorable to him. We agree with the Court of Appeals for the Fourth Circuit that if there is a conflict of views among circuits, "this presents a matter for consideration by the Supreme Court on application for certiorari, not for consideration by a district judge on application for transfer * * *. *We have no sympathy with shopping around for forums.*" *Clayton* v. *Warlick*, 232 F.2d 699, 706 (4 Cir. 1956); *see Torres* v. *Walsh*, 221 F.2d 319 (2 Cir.), *cert. denied*, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 746 (1955).

312 F.2d at 652 (emphasis added). *Accord, Scheinbart* v. *Certain-Teed Products Corp.*, 367 F. Supp. 707, 710-711 (S.D.N.Y. 1973):

> Plaintiff argues that the interests of justice will be served by trial in New York because the Second Circuit Court of Appeals, in *Rosenfeld* v. *Black*, 445 F.2d 1337 (2d Cir. 1971), has held that the Advisers Act prohibits an investment advisor from profiting by the sale of its fiduciary office. Plaintiff claims that since the law in the Third Circuit is unclear on this issue, she "should not be required to litigate her cause [there] and to shoulder the burden of seeking to establish the standard applied in *Rosenfeld* in another jurisdiction."

> Plaintiff's argument amounts to mere forum shopping. The federal courts, and this court in particular, have little sympathy for forum shopping. . . . *Plaintiff's obvious forum shopping merely adds weight to the other considerations favoring transfer.*

(Footnotes omitted; emphasis added.) *See also In re Pittsburgh & L.E. R. Co. Securities and Antitrust Litigation*, 543 F.2d 1058, 1065 n.19 (3d Cir. 1976); *Clayton* v. *Warlick*, 232 F.2d 699, 706 (4th Cir. 1956).

The lesson of these decisions is clear: There is a federal policy against forum shopping such that when continued application of the law of the transferor state is not required to effectuate *Erie* principles, the plaintiff will not be allowed to hold on to a favorable law for which he has shopped in an inconvenient forum. In the present case, plaintiff's effort to avoid dismissal because a slightly less favorable law will be applied in the more convenient forum is not only contrary to this federal policy against forum shopping, but is inconsistent with, rather than compelled by, *Erie* principles.

CONCLUSION

For the reasons stated, the order of the Court of Appeals for the Third Circuit reversing the district court's order dismissing this action, with conditions, on the ground of forum non conveniens should be reversed and the matter remanded to the Court of Appeals with directions to reinstate the district court's order of dismissal.

RESPECTFULLY SUBMITTED this 9th day of May, 1981.

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Office-Supreme Court, U.S.
FILED
MAY 16 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-848; 80-888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HARTZELL PROPELLER, INC.,
a Corporation, and
PIPER AIRCRAFT COMPANY,
a Corporation,

Petitioners,

vs.

GAYNELL REYNO, as Personal
Representative of the Estates
of William Fehilly, Liam Stewart
Fehilly, William James McDougall
Storm, David Vincent Moran and
Peter Cunningham Scott,

Respondent.

OPPOSITION TO MOTION OF THE BOEING COMPANY, LOCKHEED CORPORATION, AND McDONNELL DOUGLAS CORPORATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

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Nos. 80-848; 80-883

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HARTZELL PROPELLER, INC.,
a Corporation, and
PIPER AIRCRAFT COMPANY,
a Corporation,

Petitioners,

vs.

GAYNELL REYNO, as Personal
Representative of the Estates
of William Fehilly, Liam Stewart
Fehilly, William James McDougall
Storm, David Vincent Moran and
Peter Cunningham Scott,

Respondent.

OPPOSITION TO MOTION OF THE BOEING COMPANY, LOCKHEED CORPORATION, AND McDONNELL DOUGLAS CORPORATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

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Respondent, Gaynell Reyno, respectfully submits the following opposition to the Motion of the Boeing Company,

Lockheed Corporation, and McDonnell Douglas Corporation for Leave to File their Brief of Amici Curiae.

1. These three very large manufacturers of aviation equipment represent a considerable corner of the international aircraft market. Their products are intentionally and knowingly distributed on a world wide basis and marketed and used on the same basis. It is inherently unfair that these manufacturers should shield themselves from liability, through the doctrine of forum non conveniens, for their intentional acts of placing products which may result in serious injury or death on the international market.

The fact that an American manufacturer's wrongdoing results in severe damage to a foreign citizen on foreign

soil should in no way be utilized by such a defendant to diminish its responsibility for redress.

These three manufacturers, in filing Amici Curiae briefs, would apparently argue that more safeguards should properly accrue to a wrongdoing defendant than to an injured plaintiff who would be subject to a severe change in applicable law if dismissed from the forum in which it originally chose to file suit.

2. The parties now seeking leave of the Court have failed to demonstrate that their interests cannot be adequately protected by the Petitioners herein. Piper and Hartzell, both of whom are international suppliers of aircraft and their components, are fully aware of all the ramifications of the issue

herein. Therefore, to allow three additional parties to present identical issues to this Court as are already being presented by the parties herein, would result in repetition, cumulation and a burden to both the Court and the parties properly before it.

3. These parties have stated that their argument would be dispositive of this matter. However, such a conclusion is set forth baldly and completely void of support. In response to their statement, the question must be asked: How many aircraft manufacturers must the Court listen to in order to hear the identical argument? Respondent respectfully submits that the Court can rightfully anticipate that the briefs forthcoming from the Petitioners and Respondent herein will set forth

the issues extant and all arguments relevant thereto. There is no need to hear further argument from these three parties.

Respectfully submitted this 14th day of May, 1981.

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MOTION FILED
JUL 10 1981

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On Writs of Certiorari to the United States Courts of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR AN AMICUS CURIAE IN SUPPORT OF RESPONDENT

BRIEF FOR AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The Law Offices of Gerald C. Sterns, as attorneys representing hundreds of foreign plaintiffs in matters of international litigation pending throughout the United States, hereby respectfully move for leave to file the attached Brief as *amicus curiae* in the above-captioned matters now pending before the Court. Consent for the filing of this Brief has been obtained from counsel for Respondent in each matter, and a copy of that consent is attached to this Motion as an Appendix. Consent also has been sought

from counsel for Petitioners, but that consent has not been granted.

The Law Offices of Gerald C. Sterns (hereinafter referred to as "movant") are often retained by plaintiffs in matters involving air disasters and international products liability actions. As of the moment of this writing, movant represents foreign plaintiffs in legal actions against American manufacturers in numerous States, including California, Pennsylvania, Utah, New York, New Jersey, Washington and Illinois. The issue of *forum non conveniens* is a consistent factor in this type of international litigation, and, since October of 1979, the findings and conclusions of law in *Reyno v. Piper*, 479 F.Supp. 727, reversed, 630 F.2d 149, have been a constant and indispensable issue in all *forum non conveniens* litigation in which movant has been involved.

Petitioners Hartzell Propeller, Inc., and Piper Aircraft Company have submitted Briefs to the Court ostensibly presenting for review a single question pertaining to the propriety of granting a *forum non conveniens* dismissal where such a dismissal would result in a change in applicable law. Given the breadth of the Third Circuit's decision in *Reyno v. Piper Aircraft*, 630 F.2d 149 (1980), and the variety of issues considered therein, it is the contention of movant that any findings made by the Court on this point were not dispositive of the case, and should not be dispositive on review. This contention reaps support from Petitioners themselves as they make little attempt in their Briefs to limit their arguments to the sole question each has presented for review, but instead address such far-

reaching issues as the need to afford a foreign plaintiff the same right to choice of forum as is afforded an American plaintiff, the failure of the trial court and defendants to identify witnesses for whose convenience dismissal was required, the trial court's erroneous determination of choice of law, and the inappropriateness of justifying dismissal on the basis of unsubstantiated problems in applying foreign law.

These issues have impact far beyond the immediate facts of the cases currently before the Court. It is imperative that advocates for plaintiffs and prospective plaintiffs involved in litigation against multi-national American based companies have an opportunity to be heard on matters that directly affect their abilities to proceed against those companies in their home forums.

In contrast, the Briefs filed by Petitioners Hartzell and Piper Aircraft are supported by a proferred Brief for *Amici Curiae* filed by America's three largest airplane manufacturers. Whenever an aircraft crashes anywhere in the free world there is a very high probability that it will have been manufactured in the United States, often by one of these companies. *Amici Curiae's* protestations to the contrary notwithstanding there is no reason why foreign victims should be denied access to the courts which enforce the laws governing manufacture of the faulty and dangerous aircraft which caused them injury. The contentions made by *Amici Curiae*, if heard, require rebuttal in order properly to be evaluated.

Even should the aircraft manufacturers fail to qualify under Rule 36 for participation as *Amici*, it is respectfully requested that the attached Brief of the instant movant still be allowed. Matters therein addressed, such as the qualifications and fundamental fairness inherent in the Third Circuit's dismissal policy, reflect the impact that the Court's decision could have on a spectrum of *forum non conveniens* cases. These are matters not necessarily addressed by the parties which, of course, are primarily concerned with the formulation and refinement of the *forum non conveniens* doctrine within the confines of a single, unique fact situation. Given the importance of *forum non conveniens* as a balance to the concept of long-arm jurisdiction, it is respectfully submitted that the disposition of the cases before the Court would and should be affected by consideration of the facts and questions of law set forth in movant's Brief.

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July 8, 1981

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VS.

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On Writs of Certiorari to the
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BRIEF FOR AN AMICUS CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF THE CASE

Pursuant to the provisions of Rule 36, paragraph 5, of the Supreme Court Rules, it will be left to petitioners and respondent to set forth the factual background of the above-captioned cases in which suit was brought in this country against the American manufacturers of an aircraft and propeller involved in a fatal accident in Scotland. Suffice to say that these cases are now before the Court on writs of certiorari to the United States Court of Appeals for the Third Circuit and that they arise out of

that Circuit's decision in *Reyno v. Piper Aircraft, et al.*, 630 F.2d 149 (July, 1980). By that decision, the Third Circuit found that defendants (now petitioners) Piper Aircraft Company and Hartzell Propeller, Inc., did not meet the burden required of them for *forum non conveniens* dismissal and reversed the decision of the district court which had dismissed the case.

One of the findings made by the Third Circuit in discussing whether the district court had abused its discretion in ordering dismissal was that error had been made in the district court's choice of law determinations. Having made this finding, the Third Circuit then went on to say:

> Even under the district court's choice of law analysis, requiring a mixture of American and Scottish law, it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But this Court has held that a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified. (footnote omitted)

630 F.2d at 163-64.

The sole question before this Court pertains to the above-quoted portion of the Third Circuit's 38-page decision. Petitioner Piper Aircraft interprets the Third Circuit's declaration to mean that a foreign plaintiff may defeat a motion to dismiss a case from Federal district

court on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the Federal district court is more favorable to it than would be the laws of its native courts. (See Brief For Petitioner Piper Aircraft Company, "Question Presented" at i). Similarly, Petitioner Hartzell Propeller interprets the Third Circuit's statement to mean that a motion to dismiss on the ground of *forum non conveniens* should be denied when the law of the alternative forum is expected to be less favorable to the foreign plaintiff. (See Brief For Petitioner Hartzell Propeller, Inc., "Question Presented" at i).

It is the position of the *amicus curiae*, as set forth in this Brief, that the Third Circuit's statement and its implications are (1) misunderstood by petitioners, and (2) reflective of the fundamental fairness inherent in the doctrine of *forum non conveniens*. It is also the position of the *amicus* that the reference made to the possibility of a change in the applicable law was not a dispositive factor in the Third Circuit's decision, which, in actuality, was dictated by other substantive errors committed by the district court.

INTEREST OF AMICUS CURIAE

The Law Offices of Gerald C. Sterns have represented and are now representing hundreds of foreign-domiciled plaintiffs in lawsuits filed in America against American manufacturers whose products are sold, distributed and utilized in other lands. Jurisdiction over the type of American manufacturers involved in multi-national dealings is almost never disputed in American courts as a result of

International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny. Instead, American manufacturers, even when sued in the districts in which they have their principal places of business, often seek dismissal of actions filed by foreign plaintiffs on the ground that the American court in which such a case is pending is an inconvenient location for litigation.

In an effort to avoid being sued in a place where they have elected to do business, American manufacturers will often volunteer to be sued in a foreign jurisdiction where laws and procedures are less consumer-oriented and, therefore, more favorable to defendants. (See proffered Brief for The Boeing Company, *et al.*, "Interest of Amici Curiae" at 2). Such a maneuver, however, while extended in the name of convenience, usually serves to deprive plaintiffs of causes of action. It also, to a substantial degree, serves to immunize manufacturers from liability for the harm they cause abroad. This, in turn, encourages American manufacturers to engage in such activities as "dumping substandard products, cutting back on warnings which might discourage sales, and funneling products through offshore subsidiaries and satellites.

Since this Court's landmark decisions in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. (American) Lumbermen's Insurance*, 330 U.S. 518 (1947), controversy has raged between proponents of plaintiffs' and defendants' points of view over the proper use, requirements and extent of the *forum non conveniens* doctrine. The *Reyno v. Piper* decision issued by the Third Circuit provided a clear and thorough analysis of the purposes of the

doctrine and the methods by which it may be effected. Accordingly, by granting certiorari this Court has accepted a unique opportunity to refine and solidify an aspect of the common law which has hitherto been variously and confusingly abused, misinterpreted and misunderstood. By offering this Brief in support of respondent Gaynell Reyno, we, as *amicus curiae*, seek an affirmation of the principles espoused by the Third Circuit.

ARGUMENT

THE THIRD CIRCUIT'S STATEMENT THAT A DISMISSAL FOR FORUM NON CONVENIENS SHOULD NOT RESULT IN A CHANGE IN APPLICABLE LAW WAS (A) QUALIFIED; (B) REFLECTIVE OF THE FUNDAMENTAL FAIRNESS INHERENT IN THE DOCTRINE OF FORUM NON CONVENIENS; AND (C) NOT DISPOSITIVE OF THE CASE

In its decision in *Reyno v. Piper, supra,* 630 F.2d at 163-64, the Third Circuit noted that if plaintiff's case had to be refiled in Scotland, as defendants proposed, such a refiling would necessarily result in the application of Scottish law, thereby eliminating plaintiff's strict liability claim from consideration. But, the Circuit stated, a *forum non conveniens* dismissal is like a statutory transfer[1] between district courts in that it should not result in a change in the applicable law. However, the Circuit was careful to

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[1]The Statute to which the Court thus referred is 28 U.S.C. § 1404(a), which provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

provide exceptions to this rule, exceptions which appear to have been overlooked by petitioners. The Circuit declared (*Id.*):

> Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

By thus qualifying the rule, the Third Circuit acted in direct accord with the pervasive purpose of the *forum non conveniens* doctrine: fairness.

As set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947):

> In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.

The act of dismissal from a forum in which jurisdiction and venue are correct as a matter of law is a radical one, appropriate only in "exceptional circumstances."[3] But as this Court noted in *Gilbert, supra*, 330 U.S. at 508:

> . . . the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. (footnote omitted)

Accordingly, a court's task in hearing a *forum non conveniens* motion is to "weigh relative advantages and obstacles to a fair trial." *Id.* at 508.

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[3]See *Gulf Oil Corp. v. Gilbert, supra*, 330 U.S. at 504.

Under established principles of long-arm jurisdiction (See, e.g. *International Shoe v. Washington*, 326 U.S. 310 (1945); and *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)) a court's task is considerably burdened by the multiplicity of jurisdictions in which corporate defendants are properly subject to suit. A company like Piper Aircraft, for example, could be sued in nearly every Federal district in the nation. Consequently, the doctrine of *forum non conveniens* as a method for avoiding the harassment and vexation of trials in legally proper but otherwise inappropriate places stands as an indispensable corollary to the concept of long-arm jurisdiction. Consequently, too, the doctrine inherently holds a strong potential for abuse by defendants seeking to avoid prosecution, shop for a more favorable forum, or obtain a change in applicable law. Indeed, as will be discussed, *infra*, the standard practice of corporate defendants has become to "volunteer" to submit to jurisdiction in another country as a means for obtaining dismissals of cases brought against them in their home courts. See, *e.g., Harrison v. Wyeth*, 510 F.Supp. 1 (E.D.P.A. 1980); *Purser v. American Home Products*, 80 Civ. 710 (JMC)(S.D.N.Y. 1980).

When faced with a similar situation resulting from the ability of a defendant to seek a transfer of a case from one Federal district to another, this Court wisely established a middle ground which would allow a defendant to avoid harassment and vexation while still preserving a plaintiff's right to the advantages which must adhere to the initiator and burden-bearer of litigation. In *Van Dusen v. Barrack*, 376 U.S. 612, 626-43 (1964), it was held that a change of forum, having been obtained to accommodate the

convenience of defendant, should not also present defendant with the added bonus of a change in the applicable law.[3] Impressed by the wisdom of *Van Dusen*, the Third Circuit subsequently held in *De Mateos v. Texaco*, 562 F.2d 895, 899 (1977), that the same reasoning was applicable to dismissals on *forum non conveniens* grounds.

A dismissal, like a transfer, is permitted for reasons of convenience, and to allow either without considering the difference in law which would be applied by the transferor forum could amount to directing a verdict on the merits without examining them. See Note, 64 Harv.L.Rev. 1347, 1354-55 (1951), cited in *Van Dusen v. Barrack, supra*, 376 U.S. at 957, n.25. Moreover, since a defendant rarely, if ever, seeks a transfer to a jurisdiction with laws less favorable to it (and certainly would not "volunteer" to submit itself for suit in such a jurisdiction), the concomitant ability to change law along with courtroom would constitute a one-way street of forum-shopping benefits which would encourage multi-national corporations to burden courts with *forum non conveniens* motions in every action brought against them. Suddenly, what had existed as a safeguard of fairness would be turned into a defense trump card, smearing the established boundaries of jurisdiction and obliterating a plaintiff's legal right to select any forum where the defendant is amendable to process.

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[3] In *Van Dusen*, the Court held (376 U.S. at 633):

> Of course [cited] cases allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper vehicle.

Cf. *Headrick v. Atchison T. & S.F.R. Co.*, 182 F.2d 305, 309 (10th Cir. 1950), cited with approval in *Van Dusen v. Barrack, supra*, 376 U.S. at 631-32.

In the instant cases, the Third Circuit sought only to apply the same concepts of fairness which this Court embraced in *Van Dusen*. Naturally, however, an essential difference exists between a statutory transfer to an American court and a common law dismissal in favor of a sovereign foreign court. No court in this country can require that a court in another country apply the laws of the transferee forum. The solution adopted by the Third Circuit in *DeMateos v. Texaco, supra,* and followed by it *Reyno v. Piper, supra*, was, therefore, the only logical one available: a case cannot be dismissed if it will deprive plaintiff of his ability to recover if the facts he alleges are true.[4] Thus, a case cannot be dismissed in favor of a foreign court if it will result in a change of law so as to deprive a plaintiff of a claim which would be available under American law—unless American law is not applicable.

When would American law not be applicable? When the case has no more than a technical right to be in the original forum, as, for example, in *Canada Malting Co. v. Paterson Steamships,* 285 U.S. 413 (1932), where suit arose between a foreign plaintiff and a foreign defendant as a result of a collision between foreign vessels on the American side of the Great Lakes; or in *Dahl v. United Technologies,* 652 F.2d 1027 (3rd Cir. 1980), in which a

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[4]See Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Rev. 12, 28 (cited as authority in *Reyno* at 164, n.51.).

helicopter owned and operated by a Norwegian company which had purchased it from a Japanese company crashed in Norwegian waters and suit was then brought in Delaware, the State of incorporation of the parent company of the Connecticut manufacturer which had sold the helicopter to the Japanese seven years before. Outside of the fact that United Technologies was, like most companies on the New York Stock Exchange, originally incorporated in Delaware, there was not the slightest connection in *Dahl* between the forum and the facts of the case and plaintiffs should not, in fairness, have expected the laws of that State to apply.

Examination of cases relied upon by petitioners will reveal as a common thread that those in which dismissal was ordered on *forum non conveniens* grounds were those in which the law of the dismissing forum was not applicable. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (1975), cert. den. 96 S.Ct. 781 (1976), for example, was an admiralty case involving a German vessel, a Panamanian vessel and a Peruvian vessel in an incident which took place off the coast of England. *Swift & Co. v. Compania Columbiana*, 339 U.S. 684, 697 (1950), distinguished suits "between" foreigners. *Dauser v. Firestone Tire & Rubber Co.*, 86 F.R.D. 120 (S.D.N.Y. 1980), was an action brought in New York against an Ohio company for an accident experienced by Dutch people in Germany and the court found that the only connection the forum State had with the case was that it was one of the States in which defendant happened to be doing business. In *Pain v. United Technologies*, 637 F.2d 775 (D.C.Cir. 1980), as in *Dahl v.*

United Technologies, supra, the tort alleged bore no relevant connection to plaintiffs' chosen forum.

The cases now at issue stand in marked contrast to those relied upon by petitioners in seeking reversal of the Third Circuit's decision. The forum State of Pennsylvania is that in which defendant Piper actually constructed the allegedly defective airplane. All parties can logically expect that the laws of the State in which a defendant's acts took place will be the laws governing those acts and can plan accordingly. See Ehrenzweig, *Comments on Babcock v. Jackson,* 63 Columbia Law Review 1212, 1243 (1963). On the other hand, the inability of an injured or damaged plaintiff to prosecute an action against a defendant under the laws of the defendant's home forum effectively gives that defendant license to avoid standards of care imposed by the place where it has chosen to do business, provides only that the resulting effects occur outside the State. Worse, it gives such license in the name of convenience.

In almost all instances, convenience to one party will mean inconvenience to the other. But how much can a corporate defendant with national and multi-national operations be inconvenienced by being sued in its home court? Even in the more common situation, where a plaintiff sues a defendant in plaintiff's home court, "there is good reason why it should be tried in the plaintiff's home forum if that has been his choice." *Koster v. (American) Lumbermens Mutual Ins. Co., supra,* 330 U.S. at 524. Thus, where a plaintiff has "ceded the 'home turf' advantage" to a defendant of much greater economic capability, the arguments in favor of depriving plaintiff of his chosen

forum because of the burden that would be imposed on defendant are slim indeed. *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 453 (D.Neb. 1978). See also *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666, 673 (D.Dela. 1980).

They are particularly slim in cases involving suits on behalf of individuals against aircraft manufacturers which immediately dispatch teams of experts to the accident site. These teams become necessary parts of the official investigation groups, thus giving the manufacturers unique access to pertinent information as to the cause of the crash. Having their own personnel perform on-site investigations also gives aircraft manufacturers a decided advantage in producing live testimony at trial—wherever it may occur.

In the instant matter, a Pennsylvania aircraft manufacturer and an Ohio propeller manufacturer would have the Court believe that trial in Pennsylvania would be far more inconvenient for them than trial in a court thousands of miles and an ocean away. So onerous do defendants consider a trial in Pennsylvania to be, that they have even agreed to waive all defenses to jurisdiction if only the Court will allow them to be sued in Scotland. See *Reyno v. Piper, supra*, 630 F.2d at 155; and Brief for Petitioner Hartzell Propeller, Inc., at 3. This naturally raises the question of whether Scotland is even a viable alternative forum sufficient to enable a *forum non conveniens* dismissal. After all, *Gulf Oil Corp. v. Gilbert, supra*, 330 U.S. at 506-07, said that in *all* cases in which the doctrine comes into play it *presupposes* an alternative forum in which the defendant is amenable to process. Here, the availability

of Scotland as an alternative forum is dependent on some future act of acquiescence offered as a gesture of concession by defendants. As such, it would not have been available to plaintiff at the time she brought the action.

Faced with a similar situation in dealing with Federal forum transfers under 28 U.S.C. § 1404(a), this Court held in *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960):

> But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action "might have been brought" by plaintiff.

While *Hoffman v. Blaski* dealt with the forum transfers authorized by specific statute (which requires a lesser burden on the part of a defendant than does a motion to dismiss, *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 [1955]), the reasoning remains applicable to the instant case:

> The thesis urged by petitioners would not only do violence to the plain word of § 1404(a), but would also inject gross discrimination. That thesis, if adopted, would empower a District Court, upon a finding of convenience, to transfer an action to any district desired by the *defendants* and in which they were willing to waive their statutory defenses as to venue and jurisdiction over their persons, regardless of the fact that such transferee district was not one in which the action "might have been brought" by the plaintiff. Conversely, that thesis would not permit the court, upon motion of the *plaintiffs* and a like showing of convenience, to transfer the action to the same district, without the consent and waiver of venue and

> personal jurisdiction defenses by the defendants. (emphasis in original)

Applying the reasoning in *Hoffman* to the "two forums" test enunciated in *Gulf Oil v. Gilbert, supra*, 330 U.S. at 506-07, it is clear that if plaintiffs' cases against defendants could not have been transferred to Scotland on plaintiffs' motion for convenience, then defendants, too, should be precluded from unilaterally transferring the case. A defendant should not be able to take advantage of the subsequent device of creating for itself a jurisdiction more favorably disposed to its point of view. See *Pain v. United Technologies Corp., supra*, 637 F.2d at 783, which held that before the doctrine of *forum non conveniens* can be applied there must be two alternative forums with jurisdiction "over the subject matter and the parties."[9]

While the efforts of any corporate defendant to have a suit removed from its local court on the ground of "convenience" must be looked at with a jaundiced eye, efforts to propel a case into a distant forum where jurisdiction is dependent upon defendants' consent must bear particularly close scrutiny. In such instances, the potential for a change in law becomes all the more significant as a trial tactic (see *Reyno v. Piper, supra*, 630 F.2d at 163-64); and just as plaintiffs should not be able to burden defendants with an

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[9]The D. C. Circuit also noted in *Pain, supra*, 637 F.2d at 784, that, "As a prerequisite," the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case.

inappropriate forum, so, too, should defendants be prevented from being able selectively to submit themselves to jurisdiction.

Finally, examination of the Third Circuit's opinion in *Reyno v. Piper, supra,* 630 F.2d 149, will reveal that the issue of whether dismissal of Reyno's action would result in a change of law simply was not determinative of the Circuit's action. First, the Circuit found that the district court was in error for not according foreigners the same considerations traditionally given plaintiffs in *forum non conveniens* matters. *Id,* 159. Secondly, the Circuit found the district court in error for holding that a plaintiff's choice of forum is entitled to less weight when that forum is not plaintiff's own State of residence. *Id.* Thirdly, the Circuit found the district court in error for premising dismissal on general allegations as to the convenience of unidentified witnesses,[6] and for finding the convenience of experts "to be of small importance." *Id.* at 160-61. Fourthly, the Circuit found the district court in error for concluding that it would be unfair for defendants to be subjected to different trials on differing theories of liability in different jurisdictions. *Id.* at 162. Only fifthly, did the Circuit address the issue of the importance ascribed by the district court to the applicable choice of law rules. *Id.* at 163.

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[6]Accord, *Plum Tree, Inc. v. Stockment,* 488 F.2d 754, 756-57 (3d Cir. 1973); *American Standard, Inc. v. Bendix Corp.,* 487 F.Supp. 254, 267 (W.D.Mo. W.D. 1980); *Essex Crane Rental v. Vic Kirsch Construction,* 486 F.Supp. 529 (S.D.N.Y. 1980); *Bartolacci v. Corp. of Presiding Bishop,* 476 F.Supp. 381, 383 (E.D. Pa. 1979).

Gulf Oil Corp. v. Gilbert, supra, 330 U.S. 508, noted that choice of law is just one of the factors of public interest which has a place alongside factors of private interest in applying the doctrine. The attention which the Circuit devoted to examining the district court's findings on this issue therefore followed only from the district court's admission that choice of law was the "uppermost factor" in its decision to dismiss. See *id.* at 163 and n. 48. The Circuit thereupon found not only that the district court had erred in its choice of law determinations, but also that it had erred in its application of settled principles of *forum non conveniens. Id.* at 163. As but one of several elements[7] in this fifth finding of error, the Circuit noted that a *forum non conveniens* dismissal should not, except in certain circumstances, result in a change in the applicable law.

Obviously, this was not the *sine qua non* of the Circuit's decision and, while we submit that it is correct as a matter of law, it should not in any event be used as a basis for setting aside a well-reasoned, incisive opinion. Any decision jeopardizing the correctness of the numerous legal conclusions reached by the Third Circuit with respect to *forum non conveniens* would return the doctrine to a state of chaos and spawn a proliferation of litigation on each of the issues settled by *Reyno v. Piper.*

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[7]Others included the district court's aversion to determining and applying foreign law, and the district court's incorrect analysis of the choice of law rules which the initial forum State of California would apply to Piper and the present forum State of Pennsylvania would apply to Hartzell. *Id.* at 164-65.

CONCLUSION

The Third Circuit's decision in *Reyno v. Piper Aircraft, et al.*, 630 F.2d 149, should be affirmed and the relief sought by petitioners denied.

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July 8, 1981

(Appendix follows)

IN THE SUPREME COURT OF THE UNITED STATES

No. 80-848

PIPER AIRCRAFT COMPANY, Petitioner,

v.

GAYNELL REYNO, et al., Respondents.

CONSENT OF RESPONDENTS TO FILING OF AN AMICUS CURIAE BRIEF

The undersigned counsel for Respondents, Gaynell Reyno, et al., hereby consents to the filing of an amicus curiae brief in the above-captioned matter by the Law Offices of Gerald C. Sterns, San Francisco.

Dated:

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